Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1652

MOUNT WILSON F.M. BROADCASTERS, INC.,

Petitioner,

v.

ROBERT L. FOX AND IRA LAUFER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION 2

JAMES A. GAMMON
1925 K Street, N.W.
Suite 304
Washington, D.C. 20006
(202) 293-7979

Attorney for Petitioner, Mount Wilson F.M. Broadcasters, Inc.

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	(ii)
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
STATUTORY AND REGULATORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	15
I. Judicial Deference to the Federal Communications Commission On Legality of Sales Representative Contracts Between Licensees Is Essential to the Congressional Mandate to Regulate and Protect Competition In the Broadcast Industry	15
II. The California Courts Set a Precedent Destructive of the Uniformity Mandated by the Regulatory Scheme of the Act	12
CONCLUSION	16
APPENDIX A:	1a
B:	43a
C:	52a
D:	58a
E:	60a
F:	63a

TABLE OF CITATIONS

Page

Cases:

Becker and Silberberg,
28 R.R. 2d 1 (1973) 7

Eleven Fifty Corp.,
42 F.C.C. 2d 207 (1973) 15

Far East Conference v. United States,
342 U.S. 570 (1952) 5

First Illinois Cable TV, Inc.,
43 F.C.C. 2d 1125 (1973) 8, 13, 15

Golden West Broadcasters, 7, 8, 9, 10
16 F.C.C. 2d 918; 15 R.R. 2d 938 (1969) . . . 13, 14, 15

Great Northern R. Co. v. Merchants Elevator Co.,
259 U.S. 285, 42 S. Ct. 477,
66 L.Ed. 943 (1922) 11, 12

Jones v. Rath Packing Company,
___ U.S. ___ (Case number 75-1053
decided March 29, 1977) 10

Standard Radio and Television Company v. Chronicle Publishing Company,
Reported at 17 Pike & Fischer R.R. 2127;
Affirmed at 182 Cal. App. 2d 293, 6 Cal.
Rptr. 246, 20 Pike & Fischer R.R. 2039
(1960) 9, 10

Sudbrink Broadcasting, Inc.,
42 F.C.C. 2d 271 (1973) 8, 15

Texas & Pacific Railway v. Abilene Cotton Oil Co.,
204 U.S. 426 (1907) 6

Page

Thompson v. Texas Mexican Ry.,
328 U.S. 134, 66 S. Ct. 939,
90 L.Ed. 1132 (1946) 10

Val Jon, Inc.,
42 F.C.C. 2d 282 (1973) 15

Statutes:

The Communications Act of 1934, *as amended,*
47 U.S.C. § 1, *et seq.* 6, 11, 12

Federal Communications Commission Reports and Rulemaking Notices:

First Report and Further Notice of Proposed Rule Making,
51 F.C.C. 2d 679, 32 Pike & Fischer R.R. 2d 1527
(1975) 12

Report and Order,
59 F.C.C. 2d 894, 37 R.R. 2d 785 (1976) 8, 11

Other Authority:

Jaffe, *Primary Jurisdiction,* 77 Harv. L. Rev. 1037 (1964) . . 6

Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility,* 67 Harv. L. Rev. 436 (1954) 6

von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction,* 67 Harv. L. Rev. 929 (1954) 6

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION 2

Petitioner, Mount Wilson F.M. Broadcasters, Inc., a corporation doing business as Radio Station KBCA(FM), Los Angeles, California (hereinafter "Mount Wilson"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division 2, filed in this proceeding on January 5, 1977, in which matter the Supreme Court of the State of California denied hearing on March 3, 1977.

OPINION BELOW

The Opinion of the California Court of Appeal, rendered "not for publication" appears as Appendix C hereof. The judgement of the Superior Court of the State of California for the county of Los Angeles was filed April 4, 1975, and appears as Appendix D hereof.

JURISDICTION

The Judgment and Opinion of the Court of Appeal of California, Second Appellate District, Division 2 was filed in this proceeding on January 5, 1977, affirming the judgment of the Superior Court of the State of California for the County of Los Angeles filed April 4, 1975. Thereafter, on March 3, 1977, the Supreme Court of California denied a petition for hearing. The California Court of Appeal heard and specifically decided the federal question of applicability of the Federal Communications Commission policy to the case at bar. The Supreme Court of the State of California denied hearing on the federal question without opinion. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

All parties to the instant action are, or hold ownership interests in, broadcast licensees of the Federal Communications Commission. The California Court of Appeal purported to consider the effect of the decisions and policies of the Federal Communications Commission in regard to the legality of the agreement at issue between the parties. That court decided that the controlling Federal Communications Commission precedent was not applicable to the facts in the instant case. Further, it decided that in any event the California court was not bound by the federal agency's precedent (Appendix C, p. 56a, *infra*).

This Court is requested, therefore, to consider the following question:

IS THE CALIFORNIA COURT BOUND BY THE SUPREMACY CLAUSE OF THE FEDERAL CONSTITUTION AND/OR BY THE DOCTRINE OF PRIMARY JURISDICTION TO DEFER TO THE FEDERAL REGULATORY AGENCY ON THE QUESTION OF THE AGREEMENT'S LEGALITY?

STATUTORY AND REGULATORY PROVISIONS INVOLVED

See Appendix A.

STATEMENT OF THE CASE

The Parties

Petitioner Mount Wilson is the Federal Communications Commission (hereinafter "F.C.C.") licensee of FM Broadcast Station KBCA in Los Angeles, California. Respondents Robert L. Fox and Ira Laufer (hereinafter "Fox-Laufer") are the principals in KVEN Broadcasting Corporation, F.C.C. licensee and operator of Radio Station KVEN (AM) and KHAY (FM) in nearby Ventura, California. Fox-Laufer, jointly or individually, own more than 80% of the stock of KVEN Broadcasting Corporation and have served as its president, vice president, general manager, and station manager.

Pre-trial Events

During March of 1970, Mount Wilson and Fox-Laufer entered into an agreement which provided for exclusive sales representation of Mount Wilson by Fox-Laufer within certain limitations delineated in the agreement attached hereto as Appendix E. During December of 1970 or

January of 1971, events transpired between Mount Wilson and Fox-Laufer which the California courts have held constituted an oral extension of the aforementioned agreement for a period to terminate December 31, 1971. For various reasons which the trial court found to be without legal justification, Mount Wilson unilaterally terminated the agreement on August 31, 1971.

Proceedings Below

The trial court found that under the agreement and by virtue of the exclusive rights granted therein, Fox-Laufer were entitled to recover $21,050.85 plus interest and costs as against Mount Wilson.

Mount Wilson appealed the trial court's determination to the California Court of Appeal. Its initial pleadings on appeal addressed numerous issues concerning improper application of state law by the trial court. However, during September of 1976, after the initial pleadings on appeal had been filed, Mount Wilson, in researching this matter for its Reply Brief, discovered that the contract in question between Mount Wilson and Fox-Laufer was presumptively illegal in light of the expressed policies of the F.C.C. as applied to broadcast licensees. See extract from "Reply Brief of Appellant" at Appendix B hereof.[1] The Court of Appeal undertook to treat this federal question on the merits, ruling that the pronouncements on the subject were not applicable to the instant facts. That court further held "in any event the decision of a federal regulatory agency in another case and on other facts does not establish the illegality of the contract before us." (See Appendix C, p. 56a, *infra*).

[1] As a matter of California state law, the issue of illegality of a contract may be raised at any stage of the proceedings, including on appeal by either of the parties or *sua sponte* by the court.

REASONS FOR GRANTING THE WRIT

Summary

The writ should issue, with a view toward reversal of the decision below, because the actions of the California court directly conflict with principles of the doctrine of primary jurisdiction established by this Court. Further, a precedent has been set which eviscerates the policies of the F.C.C., causing a breakdown of uniformity under the statutory regulatory scheme. This breakdown of uniformity may have massive economic impact throughout the broadcast industry.

I. JUDICIAL DEFERENCE TO THE FEDERAL COMMUNICATIONS COMMISSION ON LEGALITY OF SALES REPRESENTATIVE CONTRACTS BETWEEN LICENSEES IS ESSENTIAL TO THE CONGRESSIONAL MANDATE TO REGULATE AND PROTECT COMPETITION IN THE BROADCAST INDUSTRY.

The doctrine of primary jurisdiction has been developed by this Court in order to avoid conflict between the courts and an administrative agency arising from either the court's lack of expertise with the subject matter of the agency's regulation or from contradictory rulings by the agency and the court. Under the doctrine, a court should defer a matter to an administrative agency for resolution, even if the matter is otherwise properly before the court, if it appears that the matter involves technical or policy considerations which are beyond the court's ordinary competence and within the agency's particular field of expertise.

This Court in *Far East Conference v. United States*, 342 U.S. 570, 574 (1952), defined the doctrine of primary jurisdiction as

a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions, of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedures.[2]

Application of the primary jurisdiction principle to the instant case reveals the public importance which attaches to the need for California to have deferred to the F.C.C. In 1969, acting under authorization of Sections 313 and 314 of the Communications Act of 1934, *as amended* (hereinafter the Act),[3] the F.C.C. set forth an important

[2] The doctrine was created by the Supreme Court in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). For general discussions of the doctrine and cases in which it has been applied, see Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964); von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929 (1954); Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 Harv. L. Rev. 436 (1954).

[3] The Communications Act of 1934, *as amended*, 47 U.S.C. § 1, *et seq.*

policy to bar broadcasting sales representative agreements which had anti-competitive effects. This policy, which took its name from the case in which it was promulgated, became known as the *Golden West* policy. The policy is a straightforward one. It prohibits the representation of a station by a sales representative "owned wholly or partially by the licensee of a competing station in the same community or service area."[4] This decision was based on the Commission's belief that such relationships give the licensee-representative a stake in the financial well-being of the station it represents, and thus militate against competition between the two stations. The mere possibility of impairment of competition will invoke the prohibition. Moreover, part of the Commission's rationale acknowledge that such arrangements work against the purpose of its multiple ownership rules – maximum diversification of program and service viewpoints.

This policy was reiterated in *Becker and Silberberg*, 28 R.R. 2d 1 (1973), a declaratory opinion by the Commission, issued in response to a request for an interpretation of the *Golden West* policy. In this case, the Commission held that a New York City Spanish language radio station could not be represented by a sales representative wholly owned by the licensee of another New York City radio station, even though the latter station was programmed specifically for a black audience. The parties argued that the stations' formats were radically different, and that they were considered to be in separate markets by the advertising industry. The Commission, however, felt that the two stations were competing within the meaning of *Golden West*, and ruled that the proposed representation would be a violation of the multiple ownership rules.

[4] 16 F.C.C. 2d 918; 15 R.R. 2d 938 at 941 (1969).

In a later *Report and Order*, 59 F.C.C. 2d 894, 37 R.R. 2d 785 (1976), the F.C.C. limited the *Golden West* cross interest prohibition to situations involving stations in the same service (meaning aural service or television service) in the "same area." The F.C.C. thus has abandoned its use of the term "same market" in favor of the "same area" test. The interpretation of "same area" is one the F.C.C. has reserved for case-by-case determination. The Commission's *Report and Order* did note, however, that the phrase "serving the same area" has been interpreted in various ways. In addition to being interpreted to include stations licensed to the same city, "serving the same area" has been construed to include stations which had a substantial overlap of service contours.[5]

Applying the *Golden West* policy to the case at hand, it was shown to the California courts, especially the Supreme Court of the State of California, that KBCA (the

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[5] In *Sudbrink Broadcasting, Inc.*, 42 F.C.C. 2d 271 (1973), the Commission ruled that two independently-owned Georgia radio stations could not be sold in combination because the Commission found that they "served the same area." This finding was based on the fact that WPCH(FM), Decatur, Georgia, placed a city grade signal over Atlanta, Georgia, and that WGST, Atlanta, Georgia, provided primary service to the residential areas of Decatur both day and night.

In a similar case, *First Illinois Cable TV, Inc.*, 43 F.C.C. 2d 1125 (1973), two Texas stations were prohibited from selling time in combination because they were "serving the same area." KLIF, Dallas, Texas, placed a 3 mV/m signal over Fort Worth at night and a 40 mV/m signal over Fort Worth during the day, thus rendering to Fort Worth primary service during daytime hours and primary service to residential areas during nighttime hours. Station KFJZ, Fort Worth, placed a 4 mV/m signal over Dallas day and night, rendering primary service to Dallas residential areas during all of its hours of operation.

Mount Wilson station) and the sales representative's (Fox-Laufer) KHAY have substantial overlap of primary signals. (See Appendix F, p. 63a, *infra*). Stated another way, they serve substantial common area. Presumptively, these two licensees serve the "same area" and, since they are independently owned, may not, under the *Golden West* policy, be represented in sales by the KHAY owners.

Thus, once they undertook to deal with the *Golden West* issue, the California courts had an obligation to defer to the F.C.C.'s primary jurisdiction. Yet, no reason has been put forward to justify their refusal to do so. Nor could there be justification. Here there are no rights or interests of innocent third parties at stake, and the subject matter falls squarely within an area which the F.C.C. has been legislatively directed to regulate.

Nor can California be heard to say that the doctrine of primary jurisdiction is unduly burdensome or inimical to California procedures. Some seventeen years ago in *Standard Radio and Television Company v. Chronicle Publishing Company*, 182 Cal. App. 2d 293, 6 Cal. Rptr. 246 (1960), California courts recognized that judicial deference is *required* by the doctrine of primary jurisdiction.[6]

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[6] "It is apparent from the various provisions of the Federal Communications Commission Act before cited, and the decisions of the United States Supreme Court, that the Commission has the power and the authority to make rules and regulations to regulate and control the trade practice complained of in the Plaintiff's Complaint.

"It is also a rule of law that when an administrative agency is set up by Congress with power and authority to act in given circumstances, the Courts withhold their action until the administrative agency has exercised the authority committed to it. This rule is generally called a rule of exclusive primary jurisdiction or exclusive preliminary jurisdiction, and it has been developed in many

(cont'd)

This Court very recently considered the related question of federal regulatory scheme supremacy over the application of state law. In the case of *Jones v. Rath Packing Company*, ___ U.S. ___ (Case number 75-1053 decided March 29, 1977), this Court set forth at considerable length its analysis of the standards which govern federal regulatory schemes precluding the application of state law in a given situation. In the Fox-Laufer case, the federal scheme to regulate broadcast licensee agreements deemed by the F.C.C. to be anti-competitive or contrary to the public interest has occupied the field at least to the extent of relegating mere application of state contract law to the back seat. Given the federal scheme (*Golden West* policy), enforceability of the sales representative agreement is subject, as a threshold proposition, to the regulatory agency's determination of legality.[7] California should have deferred.

This is far from saying that every issue involving federal questions must be deferred. There are two types of adjudicatory issues which have been held to require courts to

6 (cont'd)

cases before the United States Supreme Court." *Standard Radio and Television Company v. Chronicle Publishing Company*, reported at 17 Pike & Fischer R.R. 2127, 2128; affirmed at 182 Cal. App. 2d 293, 6 Cal. Rptr. 246, 20 Pike & Fischer R.R. 2039 (1960).

[7] See, for example, *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 66 S. Ct. 939, 90 L. Ed. 1132 (1946), where this Court unanimously reversed because of the primary jurisdiction doctrine. The Court required that the *status quo* of the train track licensing agreement be maintained pending decision of the ICC, because the matter involved not only the interests of the two parties to the agreement but phases of the public interest as well. The Court observed that by-passing the Commission to litigate the question in the courts, would shift power from the Commission to the courts. Judicial action in advance of ICC determination of the administrative questions was, accordingly, premature.

resort to the expertise of an administrative agency prior to exercising the court's inherent jurisdiction. Those are issues involving: (A) administrative discretion and (b) technical questions of fact within the scope of the agency's expertise. *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285 at 295-96 (1922).

The Fox-Laufer case clearly involves both types of issues. As to (A), the Act has vested in the F.C.C. pervasive discretionary jurisdiction over the operation of the broadcast media in order to protect the public interest. Regulation of relationships among broadcast licensees is an important area in which the Commission exercises this jurisdiction. Sales representation of one broadcast licensee by another who serves the same broadcast area, or by a sales agency with ownership interest in such a licensee, has been found inconsistent with the purposes of the Act promoting diversity of "cross interests" in the broadcast media and balanced economic competition among broadcasters in the marketplace. The F.C.C. has exercised and continues to exercise extensive discretion over factors which will promote or derogate from the purposes of the Act. Moreover, it has emphasized the continuing need for its administrative discretion in this area. In its *Report and Order, supra*, the Commission stated:

> "We are not unmindful that questions may arise as to unfair practices because of multiple representation. Therefore, we will consider *on a case-by-case basis* any such questions. . ." 59 F.C.C. 2d 897 (emphasis added).

As to (B), the exercise of this administrative discretion turns on facts peculiarly within the expertise of the Federal Communications Commission. In the aforementioned order concerning joint sales practices and in the *First Re-*

port and Further Notice of Proposed Rule Making[8] adopted January 29, 1975, concerning such practices, the Commission deliberated at length, considered extensive comments and determined it was not feasible to establish a definitive rule which can universally be applied to establish the fact of independent stations serving the "same area," *i.e.*, the test for the legality of any given joint sales agreement. This case squarely presents a question as to whether the Fox-Laufer broadcast station (KHAY, formerly KVEN-FM) serves the "same area" as KBCA. There is, as noted above, a substantial area wherein the respective primary signals overlap. (See Appendix F, p. 63a, *infra*). By charging ahead on its own, the California Court of Appeal misinterpreted the Commission's basic policy and established a dangerous precedent.

II. THE CALIFORNIA COURTS SET A PRECEDENT DESTRUCTIVE OF THE UNIFORMITY MANDATED BY THE REGULATORY SCHEME OF THE ACT.

In order to maintain the nationwide uniformity Congressionally mandated by the Act,[9] it is essential that courts defer to the Commission for initial determination of the effect of a given contract on the broadcast industry, and for the application of correct standards as to whether or not service to the "same area" exists. This need for uniformity is underscored by the fact that the gross advertising revenues of the commer-

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[8] 51 F.C.C. 2d 679, 32 Pike & Fischer R.R. 2d 1527 (1975).

[9] And preordained by this Court in *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 42 S. Ct. 477, 66 L.Ed. 943 (1922).

cial broadcast industry in 1975 totalled $6,614,400,000.[10] The F.C.C., according to its News Release of May 12, 1977, now licenses 8,137 commercial broadcast stations. (F.C.C. Release 82014).

As set forth by the F.C.C., uniform implementation of the *Golden West* doctrine is essential to maintain the economic health of this major industry. "The Commission's policy is aimed at price fixing by independent parties who should be competing with one another." *First Illinois Cable TV, Inc.*, 43 F.C.C. 2d 1125, 1128 (1973). Finding no benefits which could offset the anti-competitive aspects of the arrangements, the Commission in *Golden West* stated:

> . . . [w]e are of the view that the representation of a station by a sales representative owned wholly or partially by the licensee of a competing station in the same community or service area is a violation of long-standing Commission policy proscribing cross-interests. . . We are of the view that representation of a station by a licensee or a licensee-owned organization which operates a station in the same service in the same area gives the licensee-representative a large stake in the financial well-being of the station it represents and that this relationship necessarily mili-

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[10] Gross advertising revenues are the total amount paid by advertisers for the use of broadcast facilities. They include commissions paid to advertising agencies and representative agencies, and cover charges for broadcast time, and programs, materials, facilities and services supplied by the broadcast industry in connection with the sale of time. These data are extracted from F.C.C. Public Notices on "TV Broadcast Financial Data – 1975" Release 68100 – August 2, 1976, and "AM and FM Broadcast Financial Data, 1975" Release 73357 – November 8, 1976.

> tates against competition between the two stations. . . . In light of these facts, we believe that the relationships established . . . with another licensee . . . are antithetical to those policies which are the underpinnings of our multiple ownership rules: the promotion of maximum diversification of program and service viewpoints. *Golden West Broadcasters*, 16 F.C.C. 2d 918, 920-1; 15 Pike & Fischer R.R. 2d 938, 941-42 (1969).

If the precedent established by this California decision is permitted to stand, the F.C.C.'s *Golden West* policy has been eviscerated. The economic impact on the broadcast industry is potentially disastrous. If the several states are permitted to decide on an individual basis whether contracts presumptively violative of the public interest should be enforced or not, no means remain for maintaining the healthful balance of economic competition within the industry. The competitive advantage to be gained by broadcasters selling multiple broadcast stations in combination is obvious, as is the anticompetitive effect. Thus, if the contract remains enforceable, even though violative of the public policy, the public policy question is ignored. As noted from the figures above, the average broadcast station is dealing annually with gross advertising revenues well in excess of $800,000 per year. Even if only the 15% agency commission is considered, the Court is dealing here with nearly a billion dollars per year of potential impact. Thus, it is clear that if the precedent established by the California Court of Appeal were to be followed by courts in other states, a blow would be dealt to both the economic operation of the broadcast industry and the economy of the nation as a whole.

Moreover, the ruling of the California Court of Appeal is plainly erroneous in its application of existing F.C.C. precedent regarding the *Golden West* policy. The California Court of Appeal disposed of its entire consideration of the *Golden West* policy with two sentences:

> The *Golden West* decision has not been applied in cases where, as here, the sales representation takes place in a community other than that where licensee in which the same individual holds stock is located. In any event, the decision of a federal regulatory agency in another case, and upon other facts, does not establish the illegality of the contract before us.* (Appendix C, p. 56a, *infra*).

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* We have digested appellant's authorities filed after oral argument and are satisfied with the above disposition (footnote in original.)

The second sentence dismisses out of hand the entire doctrine of primary jurisdiction discussed above and is plainly in error. The first sentence is erroneous in that application of the *Golden West* policy has not been based on where the sales representation takes place; rather, it has consistently been based on *service to the same area* by the two broadcast facilities involved – one such facility being owned or controlled by the sales representative for the other. See *Eleven Fifty Corp.*, 42 F.C.C. 2d 207 (1973); *Sudbrink Broadcasting, Inc.*, 42 F.C.C. 2d 271 (1973); *Val Jon, Inc.*, 42 F.C.C. 2d 282 (1973); *First Illinois Cable TV, Inc.*, 43 F.C.C. 2d 1125 (1973).

The holding of the California Court of Appeal, in conflict with the stated policy of the Federal Communications Commission represents prejudicial error on this federal question, error which is itself a ground meriting grant

of this Petition for Writ of Certiorari and reversal of the decision below.

CONCLUSION

WHEREFORE, the foregoing matters being considered, this Court is respectfully requested to issue the writ and summarily reverse with direction to the state court to consider the question of its own jurisdiction and thereafter to either dismiss the action or request a ruling by the Federal Communications Commission as to the legality of the contract in question.

Respectfully submitted,

MOUNT WILSON FM BROADCASTERS, INC.

By /s/ James A. Gammon
James A. Gammon
Its Attorney

1925 K Street, N.W.
Suite 304
Washington, D.C. 20006

May 25, 1977

APPENDIX A

STATUTES, REGULATIONS, AND POLICIES INVOLVED

STATUTES:

Communications Act of 1934, *as amended*, 47 U.S. Code

> Section 4. * * * (i) The Commission may perperform any and all acts, make such rules and r regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.
>
> * * *
>
> Section 303. Except as other wise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall – * * *
>
> (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: provided, however, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;
>
> * * *
>
> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry

out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party;

* * *

Section 313. – (a) All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacturer and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: provided, however, that such licensee shall have the same right of appeal or review as is provided

by law in respect of other decrees and judgments of said court.

(b) The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under this section.

* * *

Section 314. – After the effective date of this Act no person engaged directly, or indirectly, through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this Act, shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any state, territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or the other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any state, territory, or possession of

the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph or telephone line or system (a) between any place in any state, territory, or possession of the United States, or in the District of Columbia, and any place in any other state, territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any state, territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any state, territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country,

or unlawfully to create monopoly in any line of commerce.

* * *

Section 502. Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

* * *

REGULATIONS:

47 Code of Federal Regulations * * *

§ 73.35 Multiple ownership. – (a) No license for a standard broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mV/m groundwave contours of the existing and proposed stations, computed in accordance with § 73.183 or § 73.186; or one or more television broadcast stations and the grant

of such license will result in the predicted or measured 2 mV/m groundwave contour of the proposed station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community of license of one of the television broadcast stations or will result in the Grade A contour(s) of the television broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the predicted or measured 2 mV/m contour, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published.

(b) No license for a standard broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other standard broadcast station if the grant of such license would result in a concentration of control of standard broadcasting in a manner inconsistent with the public interest, convenience, or necessity. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers, or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven standard broadcast stations, or of three broadcast stations in

one or several services, where any two are within 100 miles of the third (measured city to city), if there is primary service contour overlap of any of the stations.

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations encompassing the entire community with a city-grade signal during daytime hours (predicted or measured signal for AM, predicted for FM). The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

NOTE 1: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2: In applying the provisions of paragraphs (a) and (c) of this section, partial (as well as total) ownership interests in corporate broadcast licensees and corporate daily newspapers represented by ownership of voting stock of such corporations will be considered.

NOTE 3: Except as provided in Notes 4 and 5 of this section, in applying the provisions of paragraphs (a), (b) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

NOTE 4: In applying the provisions of paragraphs (a), (b) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, an investment company as defined in 15 USC § 80a-3 need be considered only if it directly or indirectly owns 5 percent or more of the outstanding voting stock or if officers or directors of the corporation are representatives of the investment company, provided, however, that the investment company exercises no control over the management or policies of the corporation. Holdings by investment companies under common management shall be aggregated.

NOTE 5: In applying the provisions of paragraphs (a), (b) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, a bank holding stock through its trust department in trust accounts or an insurance company need be considered

only if such bank or insurance company directly or indirectly owns 5 percent or more of the outstanding voting stock, provided, however, that the bank or insurance company exercise no control over the management or policies of the corporation. Holdings by banks or insurance companies shall be aggregated if the banks or insurance companies have any right to determine how the stock will be voted.

NOTE 6: In calculating the percentage of ownership of voting stock under the provisions of Notes 4 and 5, if an investment company, bank or insurance company directly or indirectly owns voting stock in a company which in turn directly or indirectly owns 50 percent or more of the voting stock of a corporate broadcast licensee or corporate daily newspaper, the investment company, bank or insurance company shall be considered to own the same percentage of outstanding shares of the corporate daily newspaper as it owns of outstanding voting shares of the company standing between it and the licensee corporation or corporate daily newspaper. If the intermediate company owns less than 50 percent of the voting stock of a corporate broadcast station licensee or corporate daily newspaper, the holding of the investment company, bank or insurance company, need not be considered under the 5-

percent rule, but, officers or directors of the licensee corporation or of the corporate daily newspaper who are representatives of the intermediate company shall be deemed to be representatives of the investment company, bank or insurance company.

NOTE 7: In cases where record and beneficial ownership of voting stock of a corporate broadcast station licensee or corporate daily newspaper which has more than 50 voting stockholders are not identical, e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, trusts holding stock as record owners for the benefit of designated parties, and insurance companies holding stock, the party having the right to determine how the stock will be voted will be considered to own it for the purposes of these rules.

NOTE 8: Paragraph (a) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Said paragraph will not apply to applications for increased power for Class IV stations; to applications for assignment of license or transfer of control filed in accordance with § 1.541(b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled standard broadcast stations and if no new encompassment of communities proscribed in paragraph (a) of this section as to commonly owned, operated, or controlled standard broadcast stations and television broadcast stations or daily newspapers would result. Said paragraph will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of standard broadcast stations with each other no greater than already existing. (The resulting areas of overlap of contours of standard broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) Paragraph (a) of this section will not apply to any application by a party who directly or indirectly owns, operates or controls a UHF television broadcast station where grant of such application would result

in the Grade A contour of the UHF station encompassing the entire community of license of a commonly owned, oeprated, or controlled standard broadcast station or would result in the entire community of license of such UHF station being encompassed by the 2 mV/m countour of such standard broadcast station. Such community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by paragraph (a) of this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, operated or controlled standard broadcast station and daily newspaper fall within the encompassing proscription of paragraph (a) of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

NOTE 9: Paragraph (a) of this section will not be applied to cases involving television stations which are primarily "satellite"

operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station the Grade A contour of which completely encompasses the community of license of a commonly owned, operated, or controlled standard broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such standard broadcast station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated, or controlled standard and "non-satellite" television stations may not be transferred or assigned to a single person, group, or entity except as provided in NOTE 8.

NOTE 10: For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language, and which is circulated generally in the

community of publication. A college newspaper is not considered as being circulated generally.

• • •

§ 73.240 Multiple ownership. – (a)(1) No license station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more FM broadcast stations and the grant of such license will result in any overlap of the predicted 1 mV/m contours of the existing and proposed stations, computed in accordance with § 73.313; or one or more television broadcast stations and the grant of such license will result in the predicted 1 mV/m contour of the proposed station, computed in accordance with § 73.313, encompassing the entire community of license of one of the television broadcast stations or will result in the Grade A contour(s) of the television broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the predicted 1 mV/m contour, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published.

(2) No license for an FM broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director

of any other FM broadcast station if the grant of such license would result in a concentration of control of FM broadcasting in a manner inconsistent with the public interest, convenience, or necessity. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven FM broadcast stations, or of three broadcast stations in one or several services, where any two are within 100 miles of the third (measured city to city), if there is primary service contour overlap of any of the stations.

(b) Paragraphs (a) and (c) of this section are not applicable to noncommercial educational FM stations.

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations encompassing the entire community with a city-grade signal during daytime hours (predicted or measured signal for AM, predicted for FM). The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if

there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

NOTE 1: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whate er manner exercised.

NOTE 2: In applying the provisions of paragraphs (a)(1) and (c) of this section, partial (as well as total) ownership interests in corporate broadcast licensees and corporate daily newspapers represented by ownership of voting stock of such corporations will be considered.

NOTE 3: Except as provided in Notes 4 and 5 of this section, in applying the provisions of paragraphs (a)(1), (a)(2), and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

NOTE 4: In applying the provisions of paragraphs (a)(1), (a)(2), and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, an investment company as defined in 15 USC § 80a-3 need be considered only if it directly or indirectly owns 5 percent or more of the out-

standing voting stock or if officers or directors of the corporation are representatives of the investment company, provided, however, that the investment company exercises no control over the management or policies of the corporation. Holdings by investment companies under common management shall be aggregated.

NOTE 5: In applying the provisions of paragraphs (a)(1), (a)(2) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, a bank holding stock through its trust department in trust accounts or an insurance company need be considered only if such bank or insurance company directly or indirectly owns 5 percent or more of the outstanding voting stock, provided, however, that the bank or insurance company exercise no control over the management or policies of the corporation. Holdings by banks or insurance companies shall be aggregated if the banks or insurance companies have any right to determine how the stock will be voted.

NOTE 6: In calculating the percentage of ownership of voting stock under the provisions of NOTES 4 and 5, if an investment company, bank or insurance company, directly or indirectly owns voting stock in a company which in turn directly or indirectly owns 50

percent or more of the voting stock of a corporate broadcast licensee or corporate daily newspaper, the investment company, bank or insurance company shall be considered to own the same percentage of outstanding shares of the corporate broadcast station licensee or corporate daily newspaper as it owns of outstanding voting shares of the company standing between it and the licensee corporation or corporate daily newspaper. If the intermediate company owns less than 50 percent of the voting stock of a corporate broadcast station licensee or corporate daily newspaper, the holding of the investment company, bank or insurance company, need not be considered under the 5-percent rule, but officers or directors of the licensee corporation or of the corporate daily newspaper who are representatives of the intermediate company shall be deemed to be representatives of the investment company, bank or insurance company.

NOTE 7: In cases where record and beneficial ownership of voting stock of a corporate broadcast station licensee or corporate daily newspaper which has more than 50 voting stockholders are not identical, e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the

benefit of customers, trusts holding stock as record owners for the benefit of designated parties, and insurance companies holding stock, the party having the right to determine how the stock will be voted will be considered to own it for the purposes of these rules.

NOTE 8: Paragraph (a)(1) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Said paragraph will not apply to applications for assignment of license or transfer of control filed in accordance with § 1.540(b) or § 1.541 (b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled FM broadcast stations and if no new encompassment of communities proscribed in paragraph (a)(1) of this section as to commonly owned, operated, or controlled FM broadcast stations and television broadcast stations or daily newspapers would result. Said paragraph will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of FM broadcast

stations with each other no greater than already existing. (The resulting areas of overlap of contours of FM broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) Paragraph (a)(1) of this section will not apply to any application by a party who directly or indirectly owns, operates or controls a UHF television broadcast station, where grant of such application would result in the Grade A contour of the UHF station encompassing the entire community of license of a commonly owned, operated, or controlled FM broadcast station or would result in the entire community of license of such UHF station being encompassed by the 1 mV/m contour of such FM broadcast station. Such community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with

overlapping contours or with community-encompassing contours prohibited by paragraph (a)(1) of this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this NOTE. If a commonly owned, operated or controlled FM broadcast station and daily newspaper fall within the encompassing proscription of sub-paragraph (a)(1) of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

NOTE 9: Paragraph (a)(1) of this section will not be applied to cases involving television stations which are primarily "satellite" operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station the Grade A contour of which completely encompasses the community of license of a commonly owned, operated or

controlled FM broadcast station, or the community of license which is completely encompassed by the 1 mV/m contour of such a FM broadcast station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated, or controlled FM and "non-satellite" television stations may not be transferred or assigned to a single person, group, or entity except as provided in NOTE 8.

NOTE 10: For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language, and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

* * *

§ 73.636 Multiple ownership. – (a)(1) No license for a television broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more television broadcast stations and the grant of such license will result in any overlap of the Grade B contours of the existing and proposed stations, computed in accordance with § 73.684; or one or more standard broadcast stations and the grant of such license will result in the Grade

A contour of the proposed station, computed in accordance with § 73.684, encompassing the entire community of license of one of the standard broadcast stations, or will result in the predicted or measured 2 mV/m groundwave contour(s) of the standard broadcast station(s), computed in accordance with § 73.183 or § 73.186, encompassing the entire community of license of the proposed station, or one or more FM broadcast stations and the grant of such license will result in the Grade A contour of the proposed station, computed in accordance with § 73.313, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the Grade A contour, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(2) No license for a television broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with the public interest, convenience, or necessity. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders,

officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven television broadcast stations, no more than five of which may be in the VHF band, or of three broadcast stations in one or several services, where any two are within 100 miles of the third (measured city to city), if there is primary service contour overlap of any of the stations.

(b) Paragraphs (a) and (c) of this section are not applicable to noncommercial educational television stations.

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial television station encompassing the entire community with a city-grade signal. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980.

NOTE 1: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2: In applying the provisions of paragraphs (a)(1) and (c) of this section, partial (as well as total) ownership interests in corporate broadcast licensees and

corporate daily newspapers represented by ownership of voting stock of such corporations will be considered.

NOTE 3: Except as provided in Notes 4 and 5 of this section, in applying the provisions of paragraphs (a)(1), (a)(2), and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

NOTE 4: In applying the provisions of paragraphs (a)(1), (a)(2), and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, an investment company as defined in 15 USC § 80a-3 need be considered only if it directly or indirectly owns 5 percent or more of the outstanding voting stock or if officers or directors of the corporation are representatives of the investment company, provided, however, that the investment company, exercises no control over the management or policies of the corporation. Holdings by investment companies under common management shall be aggregated.

NOTE 5: In applying the provisions of paragraphs (a)(1), (a)(2) and (c) of this section to the stockholders of a corporation which

has more than 50 voting stockholders, a bank holding stock through its trust department in trust accounts or an insurance company need be considered only if such bank or insurance company directly or indirectly owns 5 percent or more of the outstanding voting stock, provided, however, that the bank or insurance company exercise no control over the management or policies of the corporation. Holdings by banks or insurance companies shall be aggregated if the banks or insurance companies have any right to determine how the stock will be voted.

NOTE 6: In calculating the percentage of ownership of voting stock under the provisions of Notes 4 and 5, if an investment company, banks or insurance company, directly or indirectly owns voting stock in a company which in turn directly or indirectly owns 50 percent or more of the voting stock of a corpany, bank or insurance companys shall be considered to own the same perpany, bank or insurance company shall be considered to own the same percentage of outstanding shares of the corporate broadcast station licensee or corporate daily newspaper as it owns of outstanding voting shares of the company standing between it and the licensee corporation or corporate daily newspaper. If the intermediate com-

pany owns less than 50 percent of the voting stock of a corporate broadcast station licensee or corporate daily newspaper, the holding of the investment company, bank or insurance company, need not be considered, under the 5 percent rule, but, officers or directors of the licensee corporation or of the corporate daily newspaper who are representatives of the intermediate company shall be deemed to be representatives of the investment company, bank or insurance company.

NOTE 7: In cases where record and beneficial ownership of voting stock of a corporate broadcast station licensee or corrate daily newspaper which has more than 50 voting stockholders are not identical, e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, trusts holding stock as record owners for the benefit of designated parties, and insurance companies holding stock, the party having the right to determine how the stock will be voted will be considered to own it for the purposes of these rules.

NOTE 8: Paragraph (a)(1) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Said paragraph will not apply to ap-

plications for assignment of license or transfer of control filed in accordance with § 1.540(b) or § 1.541(b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled television broadcast stations and if no new encompassment of communities proscribed in paragraph (a)(1) of this section as to commonly owned, operated, or controlled television broadcast stations and standard or FM broadcast stations or daily newspapers would result. Said paragraph will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of television broadcast stations with each other no greater than already existing. (The resulting areas of overlap of contours of television broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against

the public interest, convenience, or necessity.) Paragraph (a)(1) of this section will not apply to major changes in UHF television broadcast stations authorized as of September 30, 1964, which will result in Grade B overlap with another television broadcast station that was commonly owned, operated, or controlled as of September 30, 1964; or to any application concerning a UHF television broadcast station which would result in the Grade A contour of the UHF station encompassing the entire community of license of a commonly owned, operated, or controlled standard or FM broadcast station or which would result in the entire community of license of such UHF station being encompassed by the 2 mV/m or 1 mV/m contours of such standard or FM broadcast stations, respectively. Such UHF overlap or community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by paragraph (a)(1) of this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, operated or con-

trolled television broadcast station and daily newspaper fall within the encompassing proscription of subparagraph (a)(1) of this section, the station may not be assigned to a single person, group, or entity if the newspaper is being simultaneously sold to such single person, group or entity.

NOTE 9: Paragraph (a)(1) of this section will not be applied to cases involving television stations which are primarily "satellite" operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station the Grade B contour of which overlaps that of a commonly owned, operated, or controlled "non-satellite" parent television broadcast station, or the Grade A contour of which completely encompasses the community of publication of a commonly owned, operated or controlled daily newspaper or the community of license of a commonly owned, operated or controlled standard or FM

broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such a standard broadcast station or the 1 mV/m contour of such an FM station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated, or controlled "non-satellite" television stations with Grade B overlap or such commonly owned operated or controlled non-satellite television stations and standard or FM stations with the aforementioned community encompassment, may not be transferred or assigned to a single person, group, or entity except as provided in NOTE 8. Nor shall any applicaton for assignment or transfer concerning such non-satellite stations be granted if the assignment or transfer would be to the same person, group or entity to which the commonly owned, operated or controlled newspaper is proposed to be transferred, except as provided in NOTE 8.

NOTE 10: For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

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POLICY STATEMENT

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of COMBINATION ADVERTISING RATES AND OTHER JOINT SALES PRACTICES	Docket No. 19789

REPORT AND ORDER

(Adopted: February 26, 1976; Released: June 17, 1976)

BY THE COMMISSION: COMMISSIONER HOOKS ABSENT.

1. The Commission has before it for consideration the *First Report and Further Notice of Proposed Rulemaking* adopted January 29, 1975[1] (51 FCC 2d 679 (1975)) concerning combination advertising rates and joint sales practices, a Petition for Waiver or Other Appropriate Relief filed by KCOP Television, Inc., a Petition for Partial Reconsideration filed by Cox Broadcasting Corporation, a Petition for Partial Reconsideration filed by Taft Broadcasting Company of Pennsylvania, Inc., Comments by Station Representatives Association re Petition for Waiver or Other Appropriate Relief of KCOP Television, Inc., and a Reply to Comments of Station Representatives Association Regarding Petition by KCOP Television, Inc., for Waiver or Other Appropriate Relief. Further, the Commission has before it for consideration comments and reply comments filed in response to the *First Report and Further Notice of Proposed Rulemaking*,[2] and a Petition by Sonderling Broadcasting Corporation requesting consideration of comments which were not timely filed.[3]

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[1] The First Report, which provided for the filing of comments by May 12, 1975, and reply comments by June 12, 1975 was published in the Federal Register on March 12, 1975 (40 FR 11603). By Order adopted May 1, 1975 (published in the Federal Register May 12, 1975, (40 FR 20651)) the time for submitting comments was extended to June 12, 1975, and the time for reply comments was extended to July 14, 1975.

[2] Comments were filed by the following:

Glen Barnett
One-O-One Television Network
Alan Torbet Associates, Inc.
National Cable Television Association, Inc.
Broad Street Communications Corporation
John Blair and Company
Central California Communications Corporation
Cox Broadcasting Corporation
Station Representatives Association
Lotus Reps
TN Spot Sales and Capital Broadcasting Company, Inc.
Sonderling Broadcasting Corporation

Reply Comments were submitted by the following:

John Blair and Company
Doubleday Broadcasting Company, Inc.
Cox Broadcasting Corporation
Greater Media, Inc
Eastern Carolina Broadcasting Company

[3] The petition of Sonderling Broadcasting Corporation is granted and its comments are being considered in this proceeding.

2. This proceeding was commenced by adoption on July 18, 1973 of a Notice of Inquiry and Notice of Proposed Rulemaking, 41 FCC 2d 951 (1973). Various Commission policies concerning combination advertising rates and joint sales practices were set forth in the Notice and comments were requested in order to obtain additional information with a view to codifying Commission policy or a part thereof. Upon consideration of the comments and reply comments, the Commission adopted the *First Report and Further Notice of Proposed Rulemaking*, in which it was concluded that no changes were warranted regarding some existing policies. However, the Commission proposed the adoption of a new section of the Rules to prohibit the sale or offer of sale of broadcast time on a station owned by a licensee in combination with the sale or offer of sale of broadcast time on a station owned by another licensee if there was an overlap of the contours of the two stations involved. The contours specified were the 5 mV/m groundwave contour of a standard broadcast station, the 3.16 mV/m contour of an FM broadcast station, and the contours provided as minimum field intensities over principal communities pursuant to Section 73.685 of the Rules for television broadcast stations. The rule as proposed also prohibited combination sales between broadcast licensees and separately owned cable television systems which served any part of an area circumscribed by any of the above-mentioned contours, and prohibited combination sales between commonly owned television and aural stations if there was an overlap of the contours. The sale of network time was excluded from the prohibition.

3. Additionally, the Commission in the First Report concluded that its policy set forth in *Golden West Broadcasters*, 16 FCC 2d 918 (1969), should be changed. In the *Golden West* case, the Commission held that representation of a station by a sales representative owned wholly or partially by a licensee of a competing station in the same community or service area is a violation of long-standing Commission policy proscribing cross-interests by licensees in more than a single station in the same service in the same areas. The Commission stated that the objective, of course, was the promotion and maintenance of full competition between two such stations; that representation of a station by a licensee or licensee-owned organization which operates a station in the same service in the same area gives the licensee-representative a large stake in the financial well-being of the station it represents, and that this relationship necessarily militates against competition between the two stations. Further, the Commission stated that the policy was based on its concern for potential impairment of competition, so that it was not necessary to find actual injury to competition, and that such representation was antithetical to those policies which are the underpinnings of the multiple ownership rules: the promotion of maximum diversification of program and service viewpoints. (See *Golden West*, *supra*, at p. 921.)

4. In enunciating the policy change in the First Report, the Commission stated:

> *Golden West* arose in the context of two stations in the same service, and the case ruled on the circumstances presented there. However, we perceive no reason for reaching a different result as to stations in different services but in the same market. Separately owned stations are supposed to compete at arm's length. Indeed,

the thrust of our policies as to joint sales practices is to assure such competition. It clearly runs counter to those policies for a station to represent one of its competitors in the same market.[5] Accordingly, we find that it will serve the public interest to amplify the policy set out in *Golden West* to include stations in the same market in all broadcast services. In defining the "same market," we propose to use the same standard as set forth in this Further Notice of Proposed Rulemaking. We recognize that this change in policy may call for change in representation of some stations. Therefore, this modification of policy will become effective on the date of adoption of an Order for amendment of the Rules as herein proposed. (51 FCC 2d at p. 690.)

5. Following adoption of the First Report, KCOP Television, Inc. (KCOP), Cox Broadcasting Corporation (Cox), and Taft Broadcasting Company of Pennsylvania, Inc. (Taft) filed petitions requesting waiver or other relief from the Commission's change of the *Golden West* policy. The Station Representatives Association (SRA) filed comments concerning the KCOP petition and KCOP replied to the SRA comments.

Petitions and Comments Regarding Change in the Golden West Policy

6. In its petition, KCOP, the licensee of KCOP(TV), Los Angeles, California, states that it is represented under a long-term contract by Tele-Rep, Inc., a national sales representative owned by Cox, which also owns Standard Broadcast Station KFI, Los Angeles, and requests waiver to permit continued representation by Tele-Rep, Inc. Taft states that its Radio Stations KQV and WDVE(FM), Pittsburgh, Pennsylvania are represented by the Christal Company owned by Cox which also owns WIIC-TV, Pittsburgh, and requests such action as is necessary to permit the Christal Company to continue to represent the stations. In their petitions, Cox and Taft request reconsideration of the decision to change the *Golden West* policy, both contending that radio and television stations in the same area do not compete for national business. We are persuaded by this argument and conclude that the expanded policy should be modified to permit representation of one or more separately owned television stations by a representative owned wholly or partially by a licensee of a standard broadcast station or an FM broadcast station in the same area, and vice versa. Further, representation of one or more separately owned television stations will be permissible even if the representative is owned by a licensee that is licensed for both a standard broadcast and an FM broadcast station in the same area, and vice versa. Accordingly, the Taft and KCOP petitions are granted to permit continued representation as formerly.

7. Cox also argues that extension of the *Golden West* policy is inconsistent with the Commission's decision to permit non-licensee-owned representatives to represent any number of stations in any service in the same market, and raises the question as to why licensee-owned representatives are restricted when non-licensee-owned representatives are not so restricted. Alan Torbet Associates, Inc. argues that permitting "common ownership of AM and FM radio stations in the same market constitutes acceptance of violations of the policy proscribing cross interests" by licensees far more serious than the very

[5] As noted in *Golden West*, we do not need demonstrated anticompetitive abuses in this area. ". . . it is the potential for such impairment which the Commission's policy is designed to guard against," citing *Shenandoah Life Insurance Co.*, [19 RR 1 (1959)].

tenuous cross interests resulting from common sales representation. Although we agree it is the general practice to sell advertising time on aural stations separately from the sale of time on television stations, we believe that standard broadcast stations compete with FM broadcast stations for audiences and advertising, and there is every indication that this competition is increasing. Thus, we conclude that the expanded *Golden West* policy should not be modified to permit, for example, a representative owned by the licensee of a standard broadcast station to represent a separately owned FM broadcast station in the same area. We believe that the policy should be more restrictive as to licensee-owned representatives as regards standard broadcast stations and FM broadcast stations because a representative which is owned by a rival aural station in the same area creates a situation wherein there is a real potential for minimization of full and effective competition between the two stations. Unlike the independent representative who acts as an agent for sales, the licensee-owned representative is in a position to control or exert a great deal of influence as to all aspects of the operation of its station. However, the limitation as to representation is applicable only in instances where a representative is owned by an aural broadcast station in an area where it proposes to represent a rival aural broadcast station. If a licensee has no interest in a station in an area, a representative owned by the licensee may represent any number of stations in any service in the area in the same manner as a non-licensee-owned representative. Under such circumstances, the representative will not be influenced by ownership of a rival station and can act independently in the best interest of each station it represents. In representing more than one station in an area, it will be expected that representatives will not offer combination rates for commonly owned television and aural stations[4] or offer combination rates for two separately owned stations, will enter into separate contracts with clients for each station represented and will leave all decisions as to contracting for the sale of time, including rates charged, to each licensee. We are not unmindful that questions may arise as to unfair practices because of multiple representation. Therefore, we will consider on a case-by-case basis any such questions and should we receive information that unfair practices have occurred, we will consider the matter further.

8. Sonderling Broadcasting Corporation states that there are not enough representatives to represent radio stations and proposes removal of restrictions to permit representatives, whether independent or owned by licensees, to represent more than one station in a market, contending that it would not create a duopoly problem or represent indirect control. Alan Torbet Associates, Inc., (ATA) and TN Spot Sales state that they represent small stations with contours that overlap those of stations licensed to their parent companies, that these stations do not compete, and that if they cannot continue the representation the small stations will be unable to obtain a representative. ATA asserts that expansion of the *Golden West* policy is unwarranted, counterproductive and anti-competitive, arguing that the Commission's multiple ownership rules are designed to protect the public interest

[4] In this proceeding (see paragraph 17), the Commission is adopting a policy as to combination rates by commonly owned television and aural stations serving substantially the same area.

but that extension of the policy is intended to protect the licensee-businessman from his own mistakes and is not within the province of the Commission's regulation. SRA favored multiple representation for non-licensee-owned representatives. However, Greater Media believed the Commission should either prohibit sales representatives from representing separately owned stations in the same service in the same community or adopt strict guidelines to prevent abuses. It suggested that a representative agreement be kept in the public file of the station, that the representative be required to provide a different salesman for each station who would be precluded from making combined presentations and that separate contracts, separate rates and separate billings be used. ATA and Cox suggest that rather than expanding *Golden West* the Commission consider representation of stations in different services on a case-by-case basis. ATA mentions that the proposed rules speak of sales in combination and states that if the *Golden West* policy is expanded it should be limited to combination sales. Parties also questioned the use of contours in conjunction with the *Golden West* policy, and requested extension of the effective date set forth in the First Report, i.e., the date of adoption of an Order for amendment of the Rules.

9. We do not agree that we should abandon all restrictions as to representation because there are insufficient representatives to represent all licensees. Abandonment of all restrictions as to representation would call for reversal of the *Golden West* case in which we held that representation of a station by a sales representative owned wholly or partially by a licensee of a competing station in the same service in the same area was a violation of our "cross interest" policy. The objectives of this policy are to promote and maintain full competition and to promote maximum diversification of program and service viewpoints. We conclude that it serves the public interest to promote these principles underlying the *Golden West* policy. We do not agree that expansion of the *Golden West* policy is counterproductive and anti-competitive. Although, as discussed, the expanded policy has been modified, we believe that the policy should be applicable to all aural stations to assure full competition. We do not believe that representation should be restricted as proposed by Greater Media. Further we do not agree that the expanded policy should be limited to combination sales as suggested by ATA, since the policy is to assure competition in all aspects of operation. As discussed in paragraph 16, we conclude that no rule will be adopted and that contours will not be used as a standard for determining whether stations serve the same area in regard to the *Golden West* policy and the policy as expanded. Furthermore, in response to the Cox petition and other requests, we are changing the effective date of the expanded *Golden West* policy to one year from the date of release of this *Report and Order*. The Cox petition is granted as indicated above and denied in all other respects.

10. One-O-One Television Network (One-O-One) submitted comments regarding stations in television markets 101 through 207 as identified by the American Research Bureau. One-O-One states that these stations include one third of the commercial television stations located in the smaller markets which serve 15.52 per cent of the television homes but that these stations combined receive only 7.38 per

cent of the national spot sales, or about "one-half of their justifiable dollars in proportion to homes served." It states further that there are no group efforts specifically selling this segment of the industry and proposes the following plan:[5]

> The One-O-One Television Network does not propose to grant any station exclusive rights to all network business sold by the network for the market in which the station operates. It is the belief of the network that all stations operating in any given market be offered, as nearly as practical, equal shares of the advertising weight order for the market. It should be obvious that one station in a given market will deliver a larger audience in a day part segment as compared to another station in the same market; therefore, the station with the larger audience would deliver fewer commercial announcements to fulfill its target audience weight requirements in the market, while on the other hand, the station with the smaller audience would have to present more commercial announcements to develop the target audience weight in the market which its order required. Since the network receives compensation from the advertisers and pays the stations on the basis of cost per thousand of target audience delivered per day part segment, each station in the market would receive approximately equal dollars from the network for the target audience delivered by each station for each individual order accepted and aired by each station.
>
> The share theory which is proposed by the One-O-One Television Network will enable a more uniform distribution of national advertising dollars spent in each secondary market among those stations operating in the secondary market. As a matter of established financial record, the Commission recognizes that a UHF station or a VHF station with a lesser network affiliation in a given market has great difficulty competing for its fair share of the national advertising dollars allocated to the market. It should be obvious that the share philosophy proposed by the One-O-One Television Network will aid in the solution of this particular problem. It should be remembered by the Commission that the share theory cannot run contrary to antitrust laws because the stations involved in any market do not establish the rates paid for the advertising ordered in the market. It should be further understood by the Commission that the network's share theory does not eliminate competitive factors in the market between stations operating in the market in their individual quest for local, regional or national spot business.
>
> It should be clearly understood that each station in each market shall have the exclusive right to accept or reject any order submitted to the station by the One-O-One Television Network. The network only reserves the right to reallocate audience weights to other stations operating in the market if one station has refused his proportionate share of the order for that particular market.
>
> In summary, the philosophy of the network, in essence, is to sell television markets rather than stations and to sell advertising delivered on average costs for average audiences in designated day parts rather than specific spot location. All One-O-One Television Network orders are placed on an ROS (Run of Schedule) basis per day part per week. The station only agrees to deliver the One-O-One Television Network commercial orders in the best available spot location on the day of scheduling; therefore, the station does not reduce its ability to sell fixed announcement locations to local, regional, or national advertisers.

11. One-O-One states that small market television stations with limited sales cannot attract a strong national sales representative because the revenue would not be adequate to support the sales effort. Further, it states that advertising agencies have little inclination to utilize the services of small market television stations because it costs the agency more in business expense than the 15 per cent it derives from the order. It states that group sales efforts have been common practice in the broadcasting industry principally in the field of national networks, and that networks have been an outstanding success. One-O-One requests the Commission to "arrange its rules and policies with

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[5] As a part of the plan, program material would be offered from time to time.

regard to small market television so that adequate systems and methods may be developed to allow small market television operators, through group efforts, to compete in the market place." One-O-One states that it envisions that the advertiser will establish the rate paid for delivery of target audience in units of 1,000 on a day part basis. It acknowledges that the concepts proposed are "contrary to the strict interpretation of the present rate policies of the Commission in the primary area," that is, the concept that an advertising budget for a television market can be shared by all stations operating in a market rather than by a single exclusive station in a market. However, it states that buying procedures and sales tools have changed, and that the Commission has not considered the "sale of advertising weight on a market basis." Further, One-O-One states that the Commission should eliminate the combination rate limitation for both radio and television to enable small market operators to more effectively compete. Specifically, it requests that the Commission provide in its policies or Rules for representation of more than one station in a television market by a common representative, allow stations to "accept business on the basis of rate structures established in the competitive market place for combination buying, which have no relationship to the stations' present rate structures," and that the Commission recognize that group sales organizations develop business in different ways and that "group sales efforts are beyond the scope of exclusive sales representation contracts which presently exist between stations and national representative firms."

12. One-O-One requests that it be permitted to represent more than one station in an area and that special provision be made to permit it to act on behalf of more than one station in a market, in fact, to sell time for all stations in a market based on a rate per thousand determined by an advertiser. Under present policy, a representative may represent any number of stations in separate areas and even use combination rates. Further, a representative may represent more than one station in the same area providing that combination rates are not used in regard to independently owned stations and in regard to commonly owned television and aural stations. However, the proposal of One-O-One to sell multiple independently owned stations in the same area at a fixed rate per thousand viewers for each station would conflict with our basic combination rate policy. As we stated in the Public Notice adopted January 30, 1963, combination rate agreements or practices by independent stations serving the same area raise serious questions under the policies underlying the antitrust laws, conflict with established Commission policy and are contrary to the public interest. *In the Matter of Combination Advertising Rates and Other Joint Sales Practices*, 41 FCC 2d 951 (1973). Accordingly, we are not persuaded to grant the special relief requested by One-O-One.

13. Lotus Reps, owned by Lotus Communications Corp. which operates radio stations directly or through subsidiaries, states that it represents Spanish-language AM and FM radio stations in the same city where it represents an English-language AM station owned by its parent. Lotus contends that the stations do not compete and states that this type of representation should not be barred because to do so would deprive the stations of advertising revenue. The same question

was previously considered in this proceeding. Among the parties commenting on the matter was Station Representatives Association, which stated that it was not realistic to assume that stations in the same service do not compete for the same audience, even though different techniques or program formats are used. SRA stated further that audiences were not static and neither were formats, that all stations competed with each other for a sponsor's budget, and that relaxation of the policy for stations using different formats would lead to a situation virtually impossible to administer because of changing formats and lack of objective standards on which to judge formats. In the First Report we found SRA's comments persuasive on this matter and concluded that a licensee or licensee owned sales organization that operates a station in a market should not represent another station in the same market in the same service, even though they employed different formats. We are not persuaded to change this policy, and we believe that the policy as to separate formats should be applicable as between standard broadcast stations and FM broadcast stations. Any such representation by Lotus Reps not in accordance with this policy should be discontinued.

Comments Regarding the Proposed Rule

14. As noted at the outset, we proposed the adoption of a rule that would prohibit combination sales between stations with overlap of specified contours. One respondent favored the contours as proposed for determining whether stations served the same area, and Central California Communications Corporation, the operator of a television station with a satellite station, generally supported the proposed rule and strongly supported retention of Commission policy permitting combination rates by commonly owned stations in separate markets. It requested that parent-satellite combinations be exempt from the rule if the contours were enlarged. All others commenting on this facet of the rulemaking opposed use of the contours as proposed. The parties appeared to be in opposition because, they asserted, contours did not represent the manner in which advertisers determined markets and the way stations competed for advertising. Specifically, Broad Street Communications Corporation states that the prohibition as to combination rates between stations serving the same area is designed to preserve competition in the sale of advertising, and argues that in adopting a standard for assuring competition, the Commission should select one which reflects the area in which competition actually occurs. Further, it argues that it makes no sense to apply a rule or policy designed to preserve competition in a situation where there is no competition and that this is precisely what will occur if overlapping contours are adopted. Parties gave examples of a number of markets which were sold separately but in which stations would have an overlap of contours as proposed by this rulemaking. One example given was the San Francisco-Oakland market on one hand and the Sacramento-Stockton-Modesto market on the other hand, which they asserted were different television markets, but where there would be an overlap of the principal city contours of some stations located in these separate markets. Parties state that there will be overlap of contours of television stations located in Baltimore with those of stations in Washington when these markets are considered separate, and that the same will occur as

between Boston and Providence as well as in other areas. Also a number of radio markets were listed as being considered separate markets but where there would be an overlap of contours as proposed by this rulemaking. For example, respondents state that Chicago is considered separate from Milwaukee but there would be overlap of contours of some stations in these separate markets and overlap would occur as between stations located in Boston and Providence which are also considered separate markets. As a substitute for contours, a number of suggestions were made, including use of the Area of Dominant Influence (ADI)[6] for television stations, use of the ADI for both television and radio stations, use of the ADI for television stations and Standard Metropolitan Statistical Area (SMSA)[7] for radio stations, and use of the ADI for television stations and Metro Areas[8] for radio stations. In opposing use of the ADI for radio, John Blair and Company (Blair) states that if the ADI is used it should be only as a substitute for the SMSA in the proposal of Station Representatives Association. SRA proposed a three-fold test, under which "there would not be substantiality of service area as between two or more stations if any one of the following tests were met":

(a) No overlap of service contours between the stations—5 mV/m for AM, 3.16 mV/m for FM, and principal city contour for TV; or

(b) the stations in question are licensed to communities which are located in different standard metropolitan statistical areas (SMSA). It is recognized, however, that there may be situations where stations are licensed to different SMSA's but utilize the same or adjacent antenna sites. In this type of situation a virtual congruity of service areas could exist between two stations located in different SMSA's. SRA believes that this situation can be solved by providing that the second criterion is not available in those situations where the transmitters are located within 20 miles of each other.

(c) In situations where one or more of the stations is licensed to a community not located in a SMSA, no substantiality of service area should be deemed to exist if the stations are licensed to different communities. Again a 20-mile separation requirement between transmitters should be adopted to provide for the anomalous situations of co-location of transmitters. [footnote omitted]

Various comments were received as to the proposed rule as it related to networks and cable television systems.

15. Cox, Blair and ATA opposed use of contours in conjunction with the change in the *Golden West* policy. Blair and ATA state that extension of the policy will restrict competition by limiting the number of

[6] The ADI is a television market definition developed by American Research Bureau and consists of all counties in which the home market stations receive a preponderance of viewing. Every county in the U.S. (excluding Alaska and Hawaii) is allocated exclusively in only one ADI.

[7] A Standard Metropolitan Statistical Area is an area based on a city of 50,000 or more, or its equivalent, and the county in which the city is located. The SMSA is the central county and surrounding contiguous counties of metropolitan character which are socially and economically integrated with the central county.

[8] Metro Areas generally correspond to Standard Metropolitan Statistical Areas, subject to exceptions dictated by historical industry usage and other marketing considerations.

representatives available. Blair asserts that Baltimore stations do not compete with Washington stations for national advertising and that use of the contours is at odds with reality. ATA, in commenting in regard to suburban stations, stated that suburban radio is considered as separate from metropolitan radio, and suggested as a substitute for contours, a standard used by national representatives and advertisers. Blair commented that if the contours as proposed are adopted, a specific procedure should be provided for special relief and such special relief should be available upon an appropriate showing by non-licensees as well as licensees.

16. We have considered the comments regarding use of the proposed contours to determine the area served by radio and television stations, and we do not believe that contours or any suggested substitute would be suitable for representing the area served by a station in view of the manner in which broadcast time is sold. Accordingly, we conclude that no rule will be adopted and that contours will not be used in regard to the policy set out in the *Golden West* case or the extension thereof. Further, we conclude that the policy as to combination advertising rates will be continued as before on a case-by-case basis. In our policy statement, which was adopted January 30, 1963, we stated that combination rate agreements or practices by independent stations serving the same area raise serious questions under the policies underlying the antitrust laws (15 U.S.C. 1), conflict with established Commission policy and are contrary to the public interest. *In the Matter of Combination Advertising Rates and Other Joint Sales Practices, supra.* The policy has been interpreted to apply to use of combination rates by independently owned stations whether they are in the same service or different services. *Eleven Fifty Corp.*, 42 FCC 2d 207 (1973). Further, the policy is applicable to use of combination rates even if no discount is offered. *Sudbrink Broadcasting, Inc.*, 42 FCC 2d 271 (1973). The phrase "serving the same area" has been interpreted to include stations licensed to the same city. *Eleven Fifty Corp., supra; Val Jon, Inc.*, 42 FCC 2d 282 (1973). Also the phrase has been interpreted to apply to stations licensed to nearby cities, i.e., Decatur and Atlanta, Georgia, where there was a substantial overlap of service contours.[9] *Sudbrink Broadcasting, Inc., supra.* Further, Station KFJZ, Fort Worth, Texas, and Station KLIF, Dallas, Texas, were considered to be serving the same area in view of the substantial area served in common.[10] *First Illinois Cable TV, Inc.*, 43 FCC 2d 1125 (1973).

Use of Combination Rates By Commonly Owned Television and Aural Stations Serving Substantially the Same Area

17. In the *First Report and Further Notice of Proposed Rulemaking*, we found that licensees of stations in the same market gained a competitive advantage by use of combination rates, and concluded that it was not in the public interest for commonly owned television and aural stations in the same market to be sold in combination. A prohibition as to such sales was set forth as paragraph (b) of the proposed

[9] Station WPCH(FM), Decatur, Georgia, placed a city grade service signal over Atlanta, and Station WGST, Atlanta, Georgia provided primary service to the residential area of Decatur both day and night.

[10] Station KLIF placed a 3 mV/m signal over Fort Worth at night and 40 mV/m signal over the city during daytime and Station KFJZ placed a 4 mV/m signal over Dallas both day and night.

rule. We have determined that no rule is to be adopted; however, it is our view that the prohibition as to television-radio combination rates by commonly owned stations in the same area should be made a part of Commission policy. Accordingly, the offering or use of combination rates, either directly or indirectly through a representative, by commonly owned television and aural stations serving substantially the same area is not in the public interest, and licensees will be expected to use reasonable diligence in complying.

Other Comments

18. In filing comments in this proceeding, a number of respondents favored or expressed opposition to some Commission policies discussed in the *First Report*. SRA states that it supports the policy whereby commonly owned stations in separate areas are permitted to use combination rates. However, TN Spot Sales opposed the use of combination rates by commonly owned standard broadcast and FM broadcast stations. Glen Barnett expressed his support for continuation of the policy of use of combination rates by commonly owned AM and FM stations in the same market. Doubleday Broadcasting Company, Inc. raised a question about combination rate practices by radio stations located in slightly separate parts of market areas, stating that such stations obtain business by assembly of a number of stations which are sold in combination when they should be in competition.

19. It cannot be determined from the Doubleday comments whether the stations mentioned serve the same, or different areas. If the stations serve different areas, there is no prohibition as to use of combination rates. On the other hand, if two independently owned stations served the same area, use of combination rates would violate Commission policy. As for the other comments, we stated in the *First Report* we believed that the public interest would be served by continuing the policy of permitting commonly owned stations in separate markets to use combination rates and we concluded that we would continue the policy of permitting combination rates by commonly owned standard broadcast and FM broadcast stations in the same area. We believe we should continue these policies. However, we recognize, as we did in the First Report, that unfair practices could develop in such use of combination rates. Therefore, we will consider on a case-by-case basis any questions arising as to such practices.

20. Accordingly, IT IS ORDERED, That the petitions filed by KCOP Television, Inc., Cox Broadcasting Corporation, and Taft Broadcasting Company of Pennsylvania, Inc. ARE GRANTED to the extent indicated in this *Report and Order* and DENIED in all other respects.

21. IT IS FURTHER ORDERED, That the effective date of the change of the policy set forth in the *Golden West* case is extended to June 17, 1977.

22. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

2ND CIVIL NO.
47295

APPENDIX B

In the Supreme Court of the State of California

ROBERT L. FOX and IRA LAUFER,
Plaintiffs, Cross-Defendants and Respondents,

vs.

MOUNT WILSON F.M. BROADCASTERS, INC., a corporation, dba KBCA,
Defendant, Cross-Complainant and Appellant.

APPEAL FROM SUPERIOR COURT OF LOS ANGELES COUNTY.
HON. CHARLES H. OLDER, JUDGE.

PETITION FOR HEARING AFTER DECISION BY THE COURT OF APPEAL.

LAW OFFICES OF HARVEY M. GROSSMAN,
HARVEY M. GROSSMAN,
SHEILA S. KATO,
5900 Wilshire Boulevard,
Suite 2320,
Los Angeles, Calif. 90036,
(213) 937-8220,
Attorneys for Appellant and Petitioner.

PART TWO.

THE AGREEMENT RELIED ON BY RESPONDENTS IS INVALID UNDER FEDERAL LAW.

I

THE ISSUE OF ILLEGALITY OF A CONTRACT MAY BE RAISED AT ANY TIME.

While there is some disparity in the cases,[1] the sounder view, supported by ample authority, is that where illegality of a contract appears, it is the duty of the court, *sua sponte*, to refuse to entertain the action even though the issue is not tendered by way of affirmative defense.

> "It is immaterial that the parties, whether by inadvertence or consent, even at the trial do not raise the issue. The court may do so of its own motion when the testimony produces evidence of illegality. . . . It is not too late to raise the issue on motion for new trial . . ., in a proceeding to enforce an arbitration award . . ., or even on appeal."
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> *Lewis & Queen v. N. M. Ball Sons*, 48 Cal.2d 141, 148, 308 P.2d 713 (1957).

This rule is in recognition of the inherent nature of the defense of illegality, which involves not merely

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[1]There are statements in some of the cases to the effect illegality is an affirmative defense which must be pleaded.

See, *e.g.*, *Bernstein v. Downs*, 112 Cal. 197, 204, 44 Pac. 557 (1896);

Gelb v. Benjamin, 78 Cal.App.2d 881, 884, 178 P.2d 476 (1947).

It has been suggested that such statements generally are mere *dicta*.

Witkin, *California Procedure* (2d ed. 1971) *Pleading* §919.

a personal wrong which a defendant may waive if he chooses but considerations of public policy in which the courts are called upon to protect the public interest by refusing to aid and encourage an unlawful enterprise.

In line with those considerations, the defense of illegality has been recognized even when first raised in the appellate courts.

> *LaFortune v. Ebie*, 26 Cal.App.3d 72, 75, 102 Cal.Rptr. 588 (1972);
>
> *Santoro v. Carbone*, 22 Cal.App.3d 721, 732, 99 Cal.Rptr. 488 (1972) [issue of illegality raised by the court, *sua sponte*, on appeal];
>
> *Griffis v. Squire*, 267 Cal.App.2d 461, 465, 73 Cal.Rptr. 154 (1968).

II

THE AGREEMENT IS ILLEGAL.

The Federal Communications Commission (the "Commission") has determined in what is sometimes referred to as the *Golden West* decision, that representation of Station A by a sales representative linked to Station B in the same service (*e.g.*, two F.M. radio stations) is proscribed if the two stations serve a common area. The theory here is that to permit such sales representation would contravene Commission policy proscribing cross-interests—a policy aimed at insuring competition and diversity.

In the leading case of *Golden West Broadcasters*, 16 F.C.C.2d 918 (1969),[1a] arising out of license renewal proceedings, the Commission explained:

[1a]For the convenience of the Court, copies of the Commission decision and opinions discussed here are annexed as an Appendix to this Brief. The Court is respectfully requested to take judicial notice of these matters pursuant to Evidence Code §§452(b)(c), 453, 459.

"[W]e are of the view that the representation of a station by a sales representative owned wholly or partially by the licensee of a competing station in the same community or service area is a violation of long-standing Commission policy proscribing cross-interests by licensees in more than a single station in the same service in the same areas. Sections 73.35(AM), 73.240 (FM), and 73.636 (TV) provide that no license shall be granted to any party if there would be prescribed overlap of stations owned, operated or controlled by him or if he directly or indirectly owns, operates, controls or has an interest in, or is an officer or director of any other station in the same service if the grant of such license would result in a concentration of control or broadcasting in that service in a manner inconsistent with the public interest. Our prior decisions have recognized that it would be impermissible for there to be any degree of common ownership between stations in the same broadcast service in the same area.[2] Minnesota Broadcasting Corporation, 4 Pike and Fischer RR 1376 (1949), Carolina Broadcasting Service, 25 Pike and Fischer RR 515 (1963). The objective, of course, was the promotion and maintenance of full competition between two such stations. This so called 'cross-interest' policy has been applied in situations involving other than actual proprietary ownership in-

[2]"There is now an exception to this policy. Consistent with Notes 3 and 4 of §§73.35, 73.240, and 73.636 of the Commission's Rules and Regulations, a cross-interest of less than 1% in a corporate licensee with more than 50 stockholders will not be considered as violative of this policy, nor will an interest of less than 3% held by mutual funds." (Footnote in original.)

terests. We have held that an individual who is a one-third stockholder and director of a licensee corporation could not at the same time be either employed as a salesman and part-time announcer by another station in the same area, Carolina Broadcasting Service, supra,[2a] or be a creditor of another station in the same city. KFRM, Inc., 5 FCC 2d 348, 8 Pike and Fischer RR 2d 903 (1966).[3]

[2a]In *Carolina Broadcasting Service, Inc.*, 25 Pike and Fischer RR 515 (1963) cited by the Commission in *Golden West*, the following facts were presented to the Commission:

"Mr. Carl E. Lamm, one-third stockholder and director of the licensee of Station WMPM, Smithfield, North Carolina, is presently employed by the licensee of Station WCKB, Dunn, North Carolina as salesman and part-time announcer (one hour daily) from WCKB's auxiliary studio located in Smithfield. The 2 mv/m contour of WCKB serves Smithfield, North Carolina. Site to site distance between Dunn and Smithfield is approximately 21 miles. Station WMPM is the only station licensed to serve Smithfield. . . ."25 Pike and Fischer at 515.

The Commission stated:

"With only minor variations based upon exceptional circumstances, the Commission has consistently refused to permit any degree of common ownership between stations in the same service area in the same city. . . . Although Mr. Lamm has no ownership interest in WCKB, we believe that his dual position as outlined above constitutes a 'cross-interest' prohibited by Commission policy. In the past, we have often conditioned grants of new stations so as to require a party to the applicant who is a key employee of another station in the same area to sever his connections with the existing station. See Howard C. Gilreath, 21 Pike and Fischer Radio Reg. 481 (1961). Similarly, here, we have carefully considered the arguments of the parties and have concluded that the continued relationship of Mr. Lamm as outlined above cannot be tolerated." (25 Pike and Fischer at 516.)

[3]"In our decision concerning the ABC four-part radio network proposal, 11 FCC 2d 163 at 166, 12 Pike and Fischer RR 2d 72 at 78 (167), we recognize that there are circumstances where benefits to the public might justify a relaxation of our

"We are of the view that representation of a station by a licensee or licensee-owned organization which operates a station in the same service in the same area gives the licensee-representative a large stake in the financial well-being of the station it represents and that this relationship necessarily militates against competition between the two stations. We note that in 1967 national and regional time sales produced 74.2% of the total gross revenues of Station KTVU-TV and 59.4% of the gross revenues of Station KMPC. The influence which the national and regional sales representative has on the operations of these stations is therefore readily apparent.[4] In light of these facts, we believe that the relationships established by Metromedia and Storer with another licensee in the San Francisco and Los Angeles areas, respectively, are antithetical to those policies which are the underpinnings of our multiple ownership rules: the promotion of maximum diversification of program and service viewpoints. Report and Order, Docket 14711, 2 Pike and Fischer RR 2d 1588 at 1591 (1964). Accordingly, we request that Metromedia, Storer, and Golden West inform the Commission within 30 days as to the action which they will take to sever the relationships which we have found objectionable." 16 F.C.C. 2d at 920.

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cross-interest policy. In the relationships between Metromedia and Cox Broadcasting in San Francisco and Golden West and Storer in Los Angeles we see no overriding benefits which could offset the anticompetitive implications of these arrangements." (Footnote in original.)

[4]"Even if no actual impairment of competition between Cox and Metromedia, and Storer and Golden West exists in fact,

(This footnote is continued on next page)

More recently in its opinion in *Becker and Silberberg*, 28 Pike and Fischer RR 2d 1 (1973), the Commission stated that the *Golden West* case applies to a sales representative which is owned wholly or partially by a licensee of a competing station in the same community or service area, even if the two stations are programmed differently and the markets are considered different by the advertising industry.

Measured by the above standards, the Agreement between KBCA, Fox and Laufer, in its written form and as allegedly orally extended, is violative of Commission policy and hence unlawful; at the very least, there are sufficient indicia of illegality to require reversal and remand for further trial of this issue.

Thus, the record reflects:

1. Under the Agreement, Fox and Laufer were engaged as sales representatives of KBCA [Ex. 1], a radio station based in Los Angeles, which encompasses the Ventura, California area. [C.T. 617, 618.][5]

2. At and after the time of the Agreement, Fox and Laufer were majority shareholders (with a combined ownership of over 80% of the stock) of a corporation operating KVEN/KHAY FM, a radio station based in Ventura, California (hereinafter "KVEN"). [R.T. 3/8.] Fox and Laufer have served as president and vice president of the corporation and as general

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as we said in a letter to Shenandoah Life Insurance Company, 19 Pike and Fischer RR 1 (1959) . . . it is the potential of such impairment which the Commission's policy is designed to guard against." (Footnote in original.)

[5]The record reflects that the primary signal of KBCA extends to the approaches of Ventura, California; its secondary signal encompasses the City of Ventura. [C.T. 618.]

manager [R.T. 3/8.] Fox also has acted as sales representative for KVEN in Los Angeles [R.T. 36/15] where KVEN maintains an office. [R.T. 103/2.]

Under the foregoing facts, the Commission's ban was violated by reason of the dual role of Fox and Laufer with respect to KBCA and KVEN. Accordingly, the Agreement creating that dual role must be viewed as illegal and as such unenforceable in the present action.

In enforcing the Agreement despite its illegality, the trial court committed error which should be rectified by this Court.

LaFortune v. Ebie, supra;
Santoro v. Carbone, supra;
Griffis v. Squire, supra.

While we believe the present record on this question might support a final disposition of the case on this ground, we recognize that the issue *per se* has not been tried. Under the circumstances, we believe that insofar as this issue is concerned, the most appropriate course would be for the Court to remand the case to the trial court for a new trial in which the issue can be more fully presented.

See, *e.g., LaFortune v. Ebie, supra.*[6]

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[6]In light of the fundamental issues of Federal policy which the case is now seen to pose, a further question is suggested: Is the case a suitable one for state court jurisdiction?

See *Standard Radio and Television Co. v. Chronicle Pub. Co.,* 182 Cal.App.2d 293, 6 Cal.Rptr. 246 (1960).

Conclusion to Part Two.

In view of the question of illegality of the Agreement now posed, we believe that the decision below should be reversed even apart from the errors of the trial court addressed in our Opening Brief.

Respectfully submitted,

LAW OFFICES OF HARVEY M. GROSSMAN,
HARVEY M. GROSSMAN,
SHEILA S. KATO,
Attorneys for Appellant, Mount Wilson F.M. Broadcasters, Inc.

APPENDIX C

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Robert L. Fox and Ira Laufer, Plaintiffs, Cross-Defendants and Respondents, vs. Mount Wilson F. M. Broadcasters, Inc., a corporation, dba KBCA, Defendant, Cross-Complainant and Appellant. 2d Civ. No. 47295 (Sup.Ct.No. C27123).

Filed: January 5, 1977.

Plaintiffs Ira Laufer and Robert L. Fox obtained a judgment for sums due to them as commissions for sales of radio advertising on behalf of defendant Mount Wilson F. M. Broadcasters, Inc. dba KBCA. KBCA appeals.

Fox, Laufer and KBCA entered into a written agreement on March 2, 1970 ("March Agreement") the pertinent parts of which are as follows:

> "You shall have the exclusive right to obtain radio advertising contracts from advertising agencies for the entire portion of the United States west of the Mississippi River with the exception of those agency accounts which are set forth in Schedule 'A' attached hereto. You shall have this right through December 31, 1970.
>
> "You agree not to represent any other stations with the exception of KVEN AM & FM, Ventura, California. Or any other station in which you have a stock position. [The immediate preceding sentence was interlineated by hand and initialled by the parties.]

> "You shall receive the following commissions on all advertising contracts placed by you and collected by KBCA after first deducting the agency commission: 15% of the first $10,000.00 a month in revenue obtained by you as aforesaid, 20% of the second $10,000.00 a month in revenue obtained by you as aforesaid, and 25% of all sums of money obtained by you over and above the first $20,000.00 a month as aforesaid. . . .
>
> "You shall not have the right to make any direct, non-agency sales without the expressed written consent of KBCA."

The trial court found as a fact based upon substantial evidence, that the parties orally renewed the March Agreement in January 1971 for an additional year, i.e., up to and including December 31, 1971. On August 31, 1971, however, Saul Levine, acting on behalf of KBCA, wrote Fox and Laufer "terminating your present arrangement with KBCA."

KBCA contends initially that the March Agreement could not be renewed orally by virtue of the provisions of Civil Code section 1698.

"Section 1698 [Civil Code] provides that 'A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.' The section presupposes an existing contract in writing, and accordingly, it does not invalidate a new oral agreement made after a written contract has expired by its terms or has been orally abrogated, cancelled, or rescinded by the parties. (*Treadwell v. Nickel,* 194 Cal. 243, 258-259; *McClure v. Alberti,* 190 Cal. 348, 350; *Pearsall v. Henry,* 153 Cal. 314, 325; *Burcham v. Caprio,* 94 Cal.App.2d 514, 517; *Martin v. Butter,*

93 Cal.App.2d 562, 566; *Treat v. Ogden,* 56 Cal.App. 2d 70, 74-76; *Klein Norton Co. v. Cohen,* 107 Cal. App. 325, 331; *Bevans v. Huntington,* 65 Cal.App. 266, 268.)" (*McKeon v. Giusto* (1955) 44 Cal.2d 152, 156-57.)

The March Agreement had expired according to its terms when a new contract was concluded in January 1971 which renewed the terms of the March Agreement. This was not an instance when one of the terms of an extant contract was modified by an oral agreement of the parties.

Expert evidence was introduced at trial which showed that it is custom in the trade under consideration to pay commissions to a sales representative if an order originates in the representative's sales territory, whether or not the representative has actually obtained the order. Such evidence was clearly admissible to interpret the applicable provision of the March Agreement; it showed that the usage of the trade lent a particular meaning to the contractual terms which, on their face, were unambiguous. (*Beneficial, Etc. Ins. Co. v. Kurt Hitke & Co.* (1956) 46 Cal.2d 517, 526-27.) Cases cited by appellant to the effect that this was an "exclusive agency" and that respondents did not have an "exclusive right of sale" are inapposite; the business or trade involved in the case at bench is not that involved in the cases cited by appellant. The question whether respondents had an exclusive right of sale had to be decided, as it was, on the evidence of this case.

The trial court arrived at the judgment by applying the percentages of the commissions due under the March Agreement to the net cash revenues ($220,-332.63) obtained by KBCA from advertising in re-

spondents' sales territory between April 1, 1970 and December 31, 1971; and crediting that sum with commissions actually paid ($4,490.44) and other minor credits. Appellant now contends the judgment should be reversed because it isn't clear how the sum of $220,332.63 was arrived at in the findings.

Although KBCA objected extensively to the then-proposed findings,[1] no objection was lodged to the findings on the ground now advanced. There is nothing ambiguous in the finding and appellant's claim that its factual basis "isn't clear" should have been presented to the trial court. As it is, the finding is unambiguous and is supported by the evidence.

The contention that the cost of earning the commissions accruing after August 31, 1971 should have been

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[1]"In the years 1970, 1971, and 1972, commencing April 1, 1970, the corporate defendant, MOUNT WILSON F.M. BROADCASTERS, INC., received net cash revenues from advertising agencies west of the Mississippi River resulting from contracts entered into between April 1, 1970, and December 31, 1971, in no less an amount than $220,332.63. Said advertising agency revenues were net revenues in that the agencies had deducted their commissions before forwarding the revenues to KBCA. This amount does not include two specific accounts billed but not collected, Public Computer Network and Tunemaster.

"The gross commissions to which plaintiff were entitled, based on the net cash revenues received by KBCA from advertising agencies west of the Mississippi River in the years 1970, 1971, and 1972, resulting from contracts entered into between April 1, 1970, and December 31, 1971, after giving credit to KBCA for commissions paid to the plaintiffs in the years 1970, 1971, and 1972, in the sum of $4,490.44 (Exhibits 9, 10 and 15), is $23,979.85. Said amount of $23,979.85 is determined after allowances for uncollected agency billing for Public Computer Network and Tunemaster. The commissions to plaintiffs on said billing for Public Computer Network and Tunemaster, if collected, would have been $440.00."

deducted is patently unsound. If respondents were entitled to recover under the contract, as they were, they had to recover commissions, i.e., damages pursuant to its terms. Moreover, since they were entitled to commissions whether or not they placed the order, the element of cost clearly was not intended to be credit against their earnings.

Appellant's contentions regarding a supposed breach by respondents of their obligation not to assume certain other employment amount to a re-argument of the evidence. They are obviously unsupported by the findings which rest on substantial evidence.

Appellant has brought to our attention for the first time in his Reply Brief a decision of the Federal Communications Commission in *Golden West Broadcasters*, 16 F.C.C.2d 918 (1969) which held that a one-third stockholder and director of a licensee cannot at the same time serve as an employee of another licensee. Fox and Laufer were stockholders of a radio station in Ventura at the time they were under contract with KBCA.

The *Golden West* decision has not been applied in cases where, as here, the sales representation takes place in a community other than that where licensee in which the same individual holds stock is located. In any event, the decision of a federal regulatory agency in another case, and upon other facts, does not establish the illegality of the contract before us.[2]

Appellant was fully aware of Fox' and Laufer's representation of station KVEN; the March Agreement specifically authorized Fox and Laufer to represent it

[2]We have digested appellant's authorites filed after oral argument and are satisfied with the above disposition.

in addition to KBCA. There is no evidence that this provision was breached by any of the parties to the contract.

The judgment is affirmed.

NOT FOR PUBLICATION.

Roth, *P. J.*

We concur:
Fleming, *J.*
Beach, *J.*

APPENDIX D

* * * * * *

[Filed April 4, 1975]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ROBERT L. FOX and IRA LAUFER, Plaintiffs and Cross-Defendants, vs. MOUNT WILSON F.M. BROADCASTERS INC., et al., Defendants and Cross-Complainant.	)	**NO. C 27123** **JUDGMENT**

The above-entitled cause came on regularly for trial on November 21, 1974, in Department No. 64 of the above-entitled Court, before the HONORABLE CHARLES H. OLDER, Judge Presiding, sitting without a jury, a jury having been expressly waived, GAINSLEY AND KAUFMAN, by C. BERNARD KAUFMAN, ESQ., appearing as attorneys for the plaintiffs and cross-defendants, ROBERT L. FOX and IRA LAUFER, and WAINER & STONE, INC., by IVAN R. WAINER, ESQ., appearing as attorneys for the defendants, MOUNT WILSON F.M. BROADCASTERS, INC., a corporation, and SAUL LEVINE, and cross-complainant, MOUNT WILSON F.M. BROADCASTERS, INC., a corporation, and evidence, both oral and documentary having been introduced, and the cause submitted for decision, and the Court having heretofore made and caused to be filed its written Findings of Fact and Conclusions of Law;

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiffs, ROBERT L. FOX and IRA LAUFER, have and recover from defendant and cross-complainant, MOUNT WILSON F.M. BROADCASTERS, INC., a corporation, doing business as KBCA, on plaintiffs' first cause of action, the sum of $21,050.85, together with interest thereon at the rate of seven per cent (7%) per annum from April 12, 1972, amounting to $4,387.79, together with costs amounting to $1,293.10.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiffs, ROBERT L. FOX and IRA LAUFER, shall take nothing by reason of their second cause of action in the first amended complaint.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendant and cross-complainant, MOUNT WILSON F.M. BROADCASTERS, INC., a corporation, shall take nothing by reason of its cross-complaint.

THE CLERK IS ORDERED TO ENTER THIS JUDGMENT.

DATED: April 4, 1975

/s/ Charles H. Older
CHARLES H. OLDER,
Judge of the Superior Court.

APPENDIX E

THE AGREEMENT

Suite 617 / 6505 Wilshire Boulevard / Los Angeles, California 90048 /
Phone 653-7870
KBCA

March 2, 1970

Mr. Robert L. Fox/Mr. Ira Laufer
6725 West Sunset Boulevard
Los Angeles, California

Gentlemen:

The purpose of this letter is to confirm the agreement between KBCA and yourselves in which you agreed to act as station representatives for KBCA upon the following terms and conditions:

You shall have the exclusive right to obtain radio advertising contracts from advertising agencies for the entire portion of the United States west of the Mississippi River with the exception of those agency accounts which are set forth in Schedule "A" attached hereto. You shall have this right through December 31, 1970.

You agree not to represent any other stations with the exception of KVEN AM & FM, Ventura, California *or any other station in which you have a stock position.*
R L F/S.L.

You shall receive the following commissions on all advertising contracts placed by you and collected by KBCA after deducting the agency commission: 15% of the first $10,000 a month in revenue obtained by you as

aforesaid, 20% of the second $10,000 a month in revenue obtained by you as aforesaid, and 25% of all sums of money obtained by you over and above the first $20,000 a month as aforesaid. However, in reference to agency business placed out of San Francisco, you shall receive a commission of 20% without the necessity of first attaining the $10,000 a month.

Suite 617 / 6505 Wilshire Boulevard / Los Angeles, California 90048
Phone 653-7870
KBCA

You shall not have the right to make any direct, non-agency sales without the expressed written consent of KBCA. All expenses incurred by you shall be your sole obligation.

This agreement shall become effective April 1, 1970. This represents the entire understanding between the parties.

Sincerely,

/s/

SAUL LEVINE
President

SL:cb
Attachment

Suite 617 / 6505 Wilshire Boulevard / Los Angeles, California 90048
Phone 653-7870
KBCA

SCHEDULE "A"

Coca Cola

Wilders
Schlitz
Guy Bryan Tires
Angelus Furniture*
West Coast Trade Schools
West Coast Trade Schools
Rich-Art Production
The Cook-Levitt Agency*
Baker and Associates
Jerry Pomerantz
Charles Jackson Advertising Agency
Paul Adams Advertising Agency
Century Plaza Hotel
Music City*
The Forum
The Sports Arena
Diener/Hauser Agency
All Phonograph Record Companies

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* Indicates item appears lined through in the record Exhibit "A".

APPENDIX F

The attached chart was filed as page 8(a) of Mount Wilson's "Petition for Hearing after Decision by the Court of Appeal" before the Supreme Court of the State of California. It shows the coverage contours of broadcast stations KBCA-FM and KVEN-FM (also known as KHAY-FM). The chart appears as part of the record on appeal below.

KVEN - FM
1 mv/m
KBCA - FM
1 mv/m
KVEN - FM
1 mv/m
KVEN - FM
50 uv/m
CALIFORNIA
SOUTH PORTION
LEGEND
SANTA BARBARA
VENTURA
OXNARD
SAN VALLEY
LOS ANGELES
SANTA MONICA
BAKERSFIELD
SHAFTER
WASCO
DELANO
TAFT
MARICOPA
ARVIN
LAMONT
WEED PATCH
GILDALE
ROSEDALE
SANTA MARIA
LOMPOC
SOLVANG
SANTA YNEZ
GUADALUPE
ARROYO GRANDE
GROVER CITY
PISMO BEACH
SAN LUIS OBISPO
ATASCADERO
PASO ROBLES
TEMPLETON
MORRO BAY
SANTA MARGARITA
LOS PADRES
NATIONAL
FOREST
MONTECITO
SUMMERLAND
GOLETA
GAVIOTA
SAN MIGUEL ISLAND
SANTA ROSA ISLAND
SANTA CRUZ ISLAND
CHANNEL ISLANDS
NAT'L MON
SAN CLEMENTE
AVALON
CATALINA ISLAND
TEHACHAPI
MOUNTAINS
CALIFORNIA CITY
MOJAVE
EDWARDS
EDWARDS AIR FORCE BASE
NORTH EDWARDS
CHINA LAKE
RIDGECREST
NAVAL
WEAPONS
CENTER
MOJAVE RANGE B
LANCASTER
PALMDALE
LITTLEROCK
PEARBLOSSOM
ANTELOPE
VALLEY
VICTOR
VALLEY
ADELANTO
APPLE VALLEY
HESPERIA
BARSTOW
DAGGETT
NEWBERRY
HINKLEY
LENWOOD
CALICO MTNS
SAN BERNARDINO
FONTANA
RIALTO
COLTON
REDLANDS
RIVERSIDE
ARLINGTON
BEAUMONT
BANNING
CABAZON
SAN JACINTO
SUN CITY
MORENO
PERRIS
ANAHEIM
SANTA ANA
LONG BEACH
HUNTINGTON BEACH
NEWPORT BEACH
COSTA MESA
LAGUNA BEACH
SOUTH LAGUNA
SAN CLEMENTE
PASADENA
ARCADIA
GLENDALE
BURBANK
HOLLYWOOD
WEST COVINA
WHITTIER
LA HABRA
FULLERTON
BREA
CORONA
NORCO
POMONA
ONTARIO
RANCHO CUCAMONGA
UPLAND
CLAREMONT
WALNUT
ROWLAND HTS
HACIENDA HTS
LA PUENTE
WHITTIER
NORWALK
DOWNEY
SOUTH GATE
COMPTON
EL SEGUNDO
MANHATTAN BEACH
HERMOSA BEACH
REDONDO BEACH
WILMINGTON
SAN PEDRO
PT. DUME
PT. MUGU
PT. HUENEME
PT. SAL
PT. ARGUELLO
PT. CONCEPTION
PT. SAN LUIS
PT. SUR
PT. PINOS
PT. LOBOS
PT. SAN PEDRO
PT. VICENTE
PT. LOMA
PT. ARGUELLO
CHANNEL ISLANDS NAT'L MON
SANTA BARBARA ISLAND
ANACAPA ISLANDS
SAN MIGUEL ISLAND
SANTA ROSA ISLAND
SANTA CRUZ ISLAND
SAN CLEMENTE ISLAND
CATALINA ISLAND
AVALON
LOMA LINDA
REDLANDS
SAN BERNARDINO MTNS
SAN GABRIEL MTNS
SAN GABRIEL
SAN BERNARDINO
SAN JACINTO MTNS
SAN JACINTO
SAN JACINTO PEAK
SAN GORGONIO MT
SAN GORGONIO PASS
SAN GABRIEL RIVER
SANTA ANA RIVER
SANTA ANA MTNS
SANTA ANA

Supreme Court, U. S.
FILED
JUN 24 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1652

MOUNT WILSON F.M. BROADCASTERS, INC.,
Petitioner,

vs.

ROBERT L. FOX and IRA LAUFER,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Two.

BRIEF FOR RESPONDENTS IN OPPOSITION.

ALFRED S. GAINSLEY,
ELLIS J. HORVITZ LAW CORPORATION,
ELLIS J. HORVITZ,
MARC J. POSTER,
15760 Ventura Boulevard, 7th Floor,
Encino, Calif. 91436,
(213) 995-0800,
Attorneys for Respondents
Robert L. Fox and Ira Laufer.

June 23, 1977

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Jurisdiction 2

Questions Presented 2

Argument 3

I

The State Court Judgment Rests on the Adequate Non-Federal Ground That the Illegality of the Contract Under the "Golden West" Principle Was Not Timely Raised 3

II

No Federal Question Is Presented Because the Only Evidence Relied on by Petitioner to Support Its Claim of Illegality Is Outside the Record 5

III

The "Golden West" Principle, Which Prohibits Cross-Interests in Stations Serving the Same Community, Has No Application to Stations Serving Separate Communities and Markets 80 Miles Apart 6

Conclusion 8

Appendix. United States of America Federal Communications Commission, Washington, D.C., Document .....App. p. 1

Letter to KVEN Broadcasting Corporation, Radio Station KVEN and KHAY (FM), Dated August 8, 1975 2

TABLE OF AUTHORITIES CITED

Cases	Page
Combination Advertising Rates and Other Joint Sales Practices (1976) 59 F.C.C.2d 894	7
Edelman v. California (1953) 344 U.S. 357, 97 L. Ed. 387, 73 S.Ct. 293	3
Everly Enterprises v. Altman (1960) 54 Cal.2d 761, 8 Cal.Rptr. 455, 356 P.2d 199	3
First Illinois Cable TV, Inc. (1973) 43 F.C.C.2d 1125	7
Golden West Broadcasters (1969) 16 F.C.C.2d 918	1, 2, 3, 5, 6, 7, 8
Kahn v. Wilson (1898) 120 Cal. 643, 53 Pac. 24	3
Loving & Evans v. Blick (1949) 33 Cal.2d 603, 204 P.2d 23	5
New Haven Inclusion Cases (1970) 399 U.S. 392, 26 L.Ed.2d 691, 90 S.Ct. 2054	5
Shepherd v. United States (1933) 290 U.S. 96, 78 L.Ed. 196, 54 S.Ct. 22	6
Stembridge v. Georgia (1952) 343 U.S. 541, 96 L.Ed. 1130, 72 S.Ct. 834	3, 4
Sudbrink Broadcasting, Inc. (1973) 42 F.C.C.2d 271	7
Trafton v. Youngblood (1968) 69 Cal.2d 17, 69 Rptr. 568, 442 P.2d 648	6

Statute	
United States Code, Title 28, Sec. 1257(3)	2

IN THE

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October Term, 1976
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MOUNT WILSON F.M. BROADCASTERS, INC.,
Petitioner,

vs.

ROBERT L. FOX and IRA LAUFER,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Two.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Respondents Robert L. Fox and Ira Laufer respectfully submit that the Petition for Writ of Certiorari of Petitioner Mount Wilson F.M. Broadcasters, Inc., should be denied: (1) the state court judgment rests on the adequate non-federal ground that the illegality of the sales representation contract under the *Golden West* principle was improperly raised for the first time in Petitioner's reply brief on appeal, (2) no federal question is presented because there is no evidence in the record to support the claim of illegality, the only evidence relied on by Petitioner to support the claim being outside the record, and (3) the *Golden West*

principle, which prohibits cross-interests in radio stations serving the same community, has no application where the radio stations serve separate communities and markets 80 miles apart.

Jurisdiction.

Petitioner may not invoke the jurisdiction of this Court under 28 U.S.C. §1257(3) because the judgment of the state court rests on an adequate non-federal ground. Under state law, Petitioner was precluded from questioning the legality of the sales representation contract for the first time in its reply brief on appeal. Moreover, the specious issue was based on "evidence" never offered in the trial court.

Questions Presented.

Petitioner first raised the issue of illegality of the sales representation contract under the *Golden West* principle in its reply brief in the California Court of Appeal based on evidence outside the trial record. The California Supreme Court denied a hearing on the appeal without opinion, presumably on the adequate non-federal ground that state law requires such issues to be raised and litigated in the trial court. Is Petitioner precluded from seeking jurisdiction of this Court to consider this untimely and unlitigated issue?

The *Golden West* principle prohibits cross-interests in radio stations serving the same community. Does a cross-interest in radio stations which serve separate communities and markets 80 miles apart violate the *Golden West* principle?

ARGUMENT.

I

The State Court Judgment Rests on the Adequate Non-Federal Ground That the Illegality of the Contract Under the "Golden West" Principle Was Not Timely Raised.

Petitioner never questioned the legality of the sales representation contract under the *Golden West* principle until its reply brief in the California Court of Appeal. (Petition, p. 4.) The Court rejected the belated contention. (Appendix C to Petition, p. 56a.) Petitioner again raised the issue on application for hearing before the California Supreme Court. (Appendix B to Petition, pp. 43a-51a.) That Court denied the application without opinion. The California Supreme Court denied a hearing presumably on the adequate non-federal ground that under state law such issues must be raised and litigated in the trial court (*Everly Enterprises v. Altman* (1960) 54 Cal.2d 761, 765, 8 Cal.Rptr. 455, 356 P.2d 199) and may not be raised for the first time in a reply brief on appeal. (*Kahn v. Wilson* (1898) 120 Cal. 643, 644, 53 Pac. 24.)

To merit consideration by this Court, federal questions must be seasonably raised in accordance with requirements of State law. (*Edelman v. California* (1953) 344 U.S. 357, 358, 97 L.Ed. 387, 73 S.Ct. 293.) Petitioner failed to seasonably raise the issue of the legality of the sales representation contract in accordance with requirements of California law.

Stembridge v. Georgia (1952) 343 U.S. 541, 96 L.Ed. 1130, 72 S.Ct. 834, is exactly in point. In that case, the petitioner raised a federal question for

the first time in an application for rehearing in the state intermediate appellate court. The court considered the federal question but denied the application for rehearing. The state's highest court denied a hearing without opinion on the federal question. The United States Supreme Court dismissed the case on grounds that the Petition for Certiorari was improvidently granted. The Court concluded that, because the denial of a hearing on the federal question by the state's highest court could have rested on the adequate state ground of failure to timely raise the federal question in the trial court, the Supreme Court would decline jurisdiction to review the judgment. The fact that the state intermediate appellate court considered the federal question, the Court explained (343 U.S. at 547-548),

> "does not, in our view, change the posture of this case—it does not remove the strong possibility, in light of Georgia law, that the Supreme Court of Georgia might have rested its order on a non-federal ground. We are without jurisdiction when the question of the existence of an adequate state ground is debatable."

In the instant case, as in *Stembridge*, the federal question was never raised in the trial court and was untimely raised in the intermediate state appellate court. Although the intermediate appellate court considered the federal question, the state's highest court rejected an application for hearing on the federal question without opinion.

Certiorari should be denied on the ground that the state court judgment rests on an adequate non-federal ground.

II

No Federal Question Is Presented Because the Only Evidence Relied on by Petitioner to Support Its Claim of Illegality Is Outside the Record.

Petitioner bases its claim that the sales representation contract violated the *Golden West* principle on the assertion that the broadcast signal contours of the two radio stations partially overlapped. (Petition, pp. 8-9.) Not a shred of evidence was introduced at trial to support this assertion.

The source and accuracy of the chart of "coverage contours", referred to in the Petition (Appendix F to Petition, pp. 63a-65a) is unknown. The chart was not in evidence in the trial court, was not in evidence before the California Court of Appeal, and was not in evidence before the California Supreme Court. Under well-settled rules of California procedure, appeals must be confined to the facts in the trial record. (*Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 613-615, 204 P.2d 23.) And under United States Supreme Court rules, evidence outside the record will not be considered. (*New Haven Inclusion Cases* (1970) 399 U.S. 392, 450, fn. 66, 26 L.Ed.2d 691, 90 S.Ct. 2054.)[1]

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[1]In its reply brief in the California Court of Appeal, Petitioner cited an exhibit which was admitted at trial solely for the purpose of establishing the continuing contractual relationship between Petitioner and Respondents. (Exhibit 8, C.T. 617-618, R.T. 148-149.) Petitioner could not, then or now, rely on the exhibit as proof that the broadcast signal contours of the radio stations overlapped. The exhibit, mere advertising puffery, was never offered to show, or authenticated as showing, the broadcast signal contour of Petitioner's radio station, nor did it purport to show the contour of the other radio station. Both California and Federal law rejects the use of evidence, admitted at trial to prove one fact, to establish on appeal an entirely different fact. As Mr. Justice Cardozo ex-

(This footnote is continued on next page)

Certiorari should be denied because nothing in the record supports Petitioner's claim that this case presents a federal question.

III

The "Golden West" Principle, Which Prohibits Cross-Interests in Stations Serving the Same Community, Has No Application to Stations Serving Separate Communities and Markets 80 Miles Apart.

Even if the California courts considered evidence outside the trial record, which they did not, and even if Petitioner timely raised the federal question of illegality of the contract, which it did not, nevertheless it is clear that the contract between Petitioner and Respondents does not violate the principles stated by the Federal Communications Commission ("FCC") in *Golden West Broadcasters* (1969) 16 F.C.C.2d 918.

Golden West involved a contract for sales representation of one radio station by the owner of another radio station in the same community. The FCC concluded that such a contract could lessen competition and would therefore violate the FCC's policy of promoting competition between radio stations. The FCC has never declared the *Golden West* principle applicable where stations are licensed for widely separated communities, much less where, as here, the stations are 80 miles apart and service entirely different markets. The decisions relied on by Petitioner, *Sudbrink Broadcasting, Inc.* (1973) 42 F.C.C.2d 271, and *First Illinois Cable TV, Inc.* (1973) 43 F.C.C.2d 1125, both involved stations in adjoining cities providing primary service to the same market.

The FCC has refused to harden the *Golden West* principle into an unbending rule. The FCC considers the circumstances of each case. In its recent decision, *Combination Advertising Rates and Other Joint Sales Practices* (1976) 59 F.C.C.2d 894 (Appendix A to the Petition, pp. 32a-42a), the FCC states (at paragraph 16):

> "[W]e do not believe that contours or any suggested substitute would be suitable for representing the areas served by a station in view of the manner in which broadcast time is sold. Accordingly, we conclude that no rule will be adopted and that contours will not be used in regard to the policies set out in the *Golden West* case or the extension thereof."

Thus, even with reference to evidence outside the record which purports to show a partial overlap of broadcast signal contours, Petitioner fails to show a violation of the *Golden West* principle. The two radio stations, KVEN in Ventura, and KBCA in Los Angeles,

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plained in *Shepherd v. United States* (1933) 290 U.S. 96, 103, 78 L.Ed. 196, 54 S.Ct. 22:

> "A trial becomes unfair if testimony thus accepted [for one purpose] may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected . . . ."

The California Supreme Court similarly refuses to consider evidence, offered solely to prove one fact, as proof of another fact. *Trafton v. Youngblood* (1968) 69 Cal.2d 17, 32, 69 Cal.Rptr. 568, 442 P.2d 648, explains (emphasis in original):

> "As we said . . ., 'It is frequently the case that evidence which is admissible to establish one issue may tend to establish another. . . . *If the other issue that the evidence may tend to establish is not before the court the evidence must be limited to the actual issue.* The fact of its introduction cannot be used to establish an issue that the parties have not made in their pleadings. *The Court would not be authorized to consider it as establishing an issue that was not before it for trial.*' "

do not serve the same city, or even nearby cities, or the same area or market, nor is there a substantial overlap of broadcast signal contours.

In addition, Petitioner advised the FCC of the existence of this litigation and the sale representation contract at the time of the application for renewal of KVEN's license. A letter from the FCC to KVEN shows that the FCC considered this lawsuit in determining to renew KVEN's license. (Appendix A to this Brief in Opposition.) The FCC found nothing improper in this aspect of the sales representation contract. Presumably the FCC is aware of its own policies, rules and regulations, and if it found the contract improper it would have said so.

In light of the FCC's full knowledge of the sales representation contract and the patent validity of the contract under the *Golden West* principle, Petitioner's belated attempt to question the propriety of the contract under FCC rules is groundless, wasteful, and should be rejected.

Conclusion.

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ALFRED S. GAINSLEY,
ELLIS J. HORVITZ LAW CORPORATION,
ELLIS J. HORVITZ,
MARC J. POSTER,

Attorneys for Respondents
Robert L. Fox and Ira Laufer.

June 23, 1977

APPENDIX.

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

I, Vincent J. Mullins, hereby certify that the attached is a true and correct copy of the following document on file in this Commission, and that I am official custodian of the same:

> A letter to KVEN Broadcasting Corporation, Ventura, California from the Commission's Broadcast Bureau dated August 8, 1975.
>
> IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Federal Communications Commission to be affixed, this fifth day of November, 1976.
>
> /s/ Vincent J. Mullins
> Secretary

[Seal]

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
August 8, 1975

CERTIFIED AIR MAIL—RETURN RECEIPT REQUESTED

KVEN Broadcasting Corporation
Radio Station KVEN and KHAY (FM)
P.O. Box 699
Ventura, California 93001

Attention: Robert L. Fox, President

Gentlemen:

This is in reference to your applications for renewal of license of Stations KVEN (BR-2069) and KHAY-FM (BRH-1425), Ventura, California.

As you are aware, information concerning your renewal has been brought to the Commission's attention by Mount Wilson FM Broadcasters, Inc. (licensee of KBCA, Los Angeles, California). Mount Wilson alleges, in substance, that the principals of KVEN Broadcasting Corporation (Messrs. Fox and Laufer) concealed from the Commission certain facts pertaining to a relationship between themselves and KPRO, Inc. (licensee of Radio Station KPRO, Riverside, California). More specifically, Mount Wilson alleges that: (1) Fox and Laufer acquired an ownership interest in KPRO prior to September 1, 1970 and KVEN failed to notify the Commission within 30 days as required by the Commission's Rules; (2) Fox and Laufer became vice presidents of KPRO, Inc. on March 15, 1971 and KVEN concealed the fact from the Commission by failing to report it in its 1971 renewal application or in subsequent ownership reports; and,

(3) Fox and Laufer became stockholders of KPRO, Inc. between July 19 and October 12, 1972 and KVEN did not notify the Commission within 30 days as required.

We have carefully reviewed the Commission's records for KVEN and KPRO in light of Mount Wilson's allegations and your response to those allegations. The results of that review and our conclusions are set out below. Mount Wilson alleges that on or about September 1, 1970 Robert Fox informed Saul Levine (President of Mount Wilson FM Broadcasters, Inc.) that he (Fox) and Laufer had acquired an ownership interest in KPRO, Inc. and that Fox repeated the statement more "recently" to Saul Levine's attorney. It is further alleged, that a letter signed by Robert Fox, dated November 20, 1970, is contained in the files of Station KPRO which states, in part, "Ira Laufer and I (Fox) have taken over as chief operating officers of KPRO effective October 1, 1970. Furthermore, we have taken an ownership interest in the station. . ." In reply, you complain that the Mount Wilson allegations are an attempt to harass KVEN because of pending civil litigation in the California State Courts between Mount Wilson and Fox and Laufer. You state KPRO and Laufer entered into an employment agreement September 1, 1970 but that the contract did not provide for stock ownership. You further state there was an oral understanding that KPRO, Inc. was to be re-incorporated and that on completion of the re-incorporation Fox and Laufer would be given the right to purchase 10% (5% each) of the common stock of KPRO, Inc. In addition, you explain that neither Fox nor Laufer are lawyers and the use of the term "ownership interest" by Fox was based on his understanding

of what his interest would eventually be and not on any legal right he actually had.

The record shows no provision in the Fox-Laufer non-exclusive employment agreements of September 1, 1970 for either a percentage of the profits and/or a sharing of the losses. Thus, these agreements were not required (by Section 1.613 of the rules) to be filed with the Commission. The record also indicates the oral "understanding" was set out in writing September 21, 1970 in the form of a "deal points" summary from KPRO's legal counsel to its principals. The summary shows that Fox and Laufer would be permitted to purchase 10% of the common stock of "the company." However, the sale was contingent on the re-incorporation of KPRO, the resolution of certain legal and tax questions, and the concurrence of KPRO's principals. When considered in full light of the questions involved and the two years it took to draw forth a final agreement from the understanding, it does not appear that Fox and Laufer acquired, prior to July 19, 1972, any interest in KPRO which KVEN was required to report to the Commission. In addition, The Superior Court of the State of California for the City of Los Angeles rendered a judgment, April 4, 1975, which is relevant to this issue. Specifically, in the matter of *Robert L. Fox and Ira Laufer v. Mount Wilson F.M. Broadcasters, Inc., et al.*, No. C27123 the court held, in pertinent part:

> Under the terms of the employment agreement between Plaintiffs (Fox and Laufer) and radio station KPRO, entered into in 1970, plaintiffs did not acquire either an ownership interest or stock position in said radio station KPRO. . . .

> Plaintiffs did not acquire stock or own stock in radio station KPRO, Riverside, until September 27, 1972, and plaintiffs did not enter into an agreement to purchase stock in KPRO until July 19, 1972.

Mount Wilson also alleges that Fox and Laufer became vice presidents of KPRO, Inc. March 15, 1971, and that KVEN concealed this fact from the Commission by failing to report it in its 1971 renewal application filed September 1, 1971 or in ownership reports filed October 6, 1971 and February 1, 1973. The record shows that Fox and Laufer were elected on March 15, 1971 as "part time" vice presidents of KPRO, Inc., in charge of sales and station operation, respectively. The position of "part time" vice president did not confer on either Fox or Laufer any control of KPRO, Inc. and thus, did not constitute a change which KVEN, Inc. was required to report to the Commission.

Mount Wilson further alleges that Commission records for KPRO, filed October 16, 1972 show Fox and Laufer as 10% owners of KPRO's common stock, but these records for KVEN also indicate that the first time KVEN informed the Commission of the Fox-Laufer stock holdings in KPRO, Inc. was by ownership report filed January 4, 1974. In addition Mount Wilson alleges ownership reports for KVEN filed October 6, 1971 and February 1, 1973 and the 1971 renewal application specifically denied any broadcast interests (except KVEN) for Fox and Laufer. Therefore, it is averred, the information was concealed.

The record shows that KPRO, Inc. and Fox and Laufer consummated an agreement July 19, 1972 which, in substance, provided for the future purchase of KPRO

stock by Fox and Laufer. The agreement was expressly conditioned on the prior approval of the sale of the securities by the California State Commissioner of Corporations. An ownership report filed October 16, 1972 for KPRO shows the actual transfer of the stock occurred September 27, 1972. Section 1.615(a) of the Commission's Rules requires each licensee of a commercial broadcast station to file an ownership report when the application for renewal of station license is required to be filed. The name, stockholdings of officers, directors and stockholders, among other things, must be reported. In addition, Section 1.615(c) requires, in part:

> (c) A supplemental Ownership Report (FCC Form 323) shall be filed by each licensee or permittee within 30 days after any change occurs in the information required by the Ownership Report from that previously reported. . .

Thus, the agreement of July 19, 1972 and the actual stock transfer September 27, 1972 were changes which KVEN was required to report. The fact that the information was on file with the Commission (in KPRO's license file) does not alleviate KVEN's duty to comply fully with the reporting requirements of the rules. In addition, your failure to report, on the 1971 renewal application, that Fox and Laufer were officers of KPRO, Inc., demonstrates a lack of prudence. While not in violation of the strict letter of the rules, neither does it meet the spirit of the Commission's Rules.

The Communications Act requires the Commission to determine, in the case of each application filed with it, whether the public interest, convenience, and necessity will be served by a grant of that application.

We believe we can make that determination here without further administrative inquiry. We note particularly that the required information was available in the Commission's files through submission by KPRO. However, your failure to comply with the reporting requirements of the Commission's rules cannot be condoned. A copy of this letter will be placed in KVEN's permanent record file at the Commission and your strict adherence to the rules in the future will be expected.

Sincerely yours,

/s/ James R. Hobson
For Richard J. Shiben
Chief, Renewal & Transfer Division
Broadcast Bureau

cc: James A. Gammon, Esq.
A. Harry Becker, Esq.